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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPERIOR AND COMMON PLEAS COURTS.

RESTRICTIONS IN DEED AS TO CHARACTER OF IMPROVEMENTS.

[Hamilton Common Pleas, May 3, 1904.]

*STEPHEN H. BURTON ET AL. V. MABEL A. STAPELY.

1. ACTION BY GRANTOR FOR VIOLATION OF BUILDING RESTRICTION IN DEED.

Where there are restrictions in a deed conveying the fee, which forbid the grantee from erecting any building except of a certain kind upon the ground, the grantor may bring an action for a violation of the covenants by the grantee even although the lot is in a subdivision where there is no "plan" (as to kind and cost of houses, etc.), and although there are no restrictions upon any of the other lot owners in the subdivision, and, further, that the grantor owned no lot in the subdivision except this one sold to the defendant.

2. APARTMENT HOUSE A VIOLATION OF RESTRICTION TO USE FOR "RESIDENCE PURPOSES ONLY."

Building an apartment house is a violation of a restriction which requires the grantee to use the lot "for residence purposes only."

3. RESTRICTION AS TO UNIFORMITY OF FRONTAGE.

A restriction in a deed that the front of said dwelling house or any part thereof shall not be nearer to the street than the house next east, means that the front walls of both houses must be in line with each other; and to build a house so that its front wall is in a line with the front of the porch of the adjacent house is a violation of the restriction in the deed.

4. EQUITY WILL ENJOIN THREATENED VIOLATIONS OF BUILDING RESTRICTIONS.

When there are restrictions put upon the grantee in a deed as to the use of the ground, a court of equity will, in behalf of the grantor, restrain any violation of the restrictions which are threatened by the grantee.

[Syllabus by the court.]

J. S. Conner, L. J. Dolle and Constant Southworth, for plaintiff.
Shay & Cegan, for defendant.

LITTLEFORD, J.

INJUNCTION.

The plaintiffs in this case ask for an injunction against the defendant, to restrain her from building an apartment house on the lot

*Affirmed by the Supreme Court, no report, *Burton v. Stapely*, 74 Ohio St. 461.

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which they had recently sold to her, on the ground that she is violating a restriction on the use of the property, contained in the deed to her. The facts in the case are not in dispute. Plaintiffs were the owners of a lot of ground situated on the south side of Clinton Springs avenue, in Cincinnati, directly opposite the point where Mitchell avenue runs diagonally into Clinton Springs avenue.

This lot is lot 1 of A. O. Tyler's subdivision in Cincinnati, Ohio. It was the only lot owned by these plaintiffs in that subdivision, on the south side of Clinton Springs avenue, but they have an interest in tracts of land on Mitchell avenue, not far from the lot in question. There is no "plan" governing the lots in that part of Tyler's subdivision—that is, the owners of the lots in that subdivision can build to the street line if they see fit.

In August, 1903, the plaintiffs in this case sold the lot in question to the defendant, and in the deed to her inserted the following clause:

"Subject, however, to the conditions and restrictions hereinafter contained which are to run with the land herein conveyed and to be observed and performed by, and to be binding upon said grantee, her heirs, representatives and assigns, with the right in the grantors herein, their successors and assigns, or any present or future owner or owners of any lot or lots in said subdivision, their heirs, representatives or assigns, to enforce any or all of said conditions or restrictions; together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; to have and to hold the same to the only proper use of the said Mabel A. Stapely, her heirs and assigns forever, subject to the following restrictions and conditions, to wit: That said grantee, her heirs or assigns, shall use said premises hereby conveyed, for residence purposes only, including necessary outbuildings thereon, and a stable. That no dwelling house shall be erected or re-erected or maintained on said premises to cost less than four thousand dollars, and that the front of said dwelling house or any part thereof, or any structure thereon, shall not be nearer than the house next east of said property from the front line of said premises; and said premises or any dwelling house which may be erected thereon, shall not be used for any mercantile, manufacturing or business purposes; or for a public or private hospital, or for infirmary purposes; and no fermented, distilled or other liquors shall be sold on said premises hereby conveyed. All building materials of all kinds used in building upon or the improving of said lot, shall be deposited on the lot herein conveyed. The walk and curb shall be protected from any and all damages. All the restrictions and conditions herein are binding upon the said Mabel A. Stapely, her heirs and assigns, until the year, A. D. 1917; and this conveyance is accepted by said grantee for Mabel A. Stapely and for her heirs and assigns subject to the foregoing restrictions."

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The petition in the case alleges that the defendant, disregarding the covenants in her deed, threatens to build, and is now building a large flat building on said lot; and, furthermore, that she is about to locate her said flat building so that its front wall will be nearer to the front of her lot than the front wall of the dwelling house next east of her property is to the front of its lot. Said dwelling house is alleged to be sixty-five feet distant from the front line of the lot on which it stands. The testimony of the defendant's own witnesses is to the effect that she is about to erect on her lot a very large apartment house, intended to accommodate from fifteen to twenty families, and to cost \$100,000. The building is to be three stories high, in length one hundred and seventy feet, six inches, and in depth fifty-three feet, three inches. Furthermore, it is to have no front porches, and the edge of the building itself is to be fifty-five feet from the front of the lot, while the stone steps in front of it will be fifty-one feet from the front of the lot. It is admitted that the building will be considerably closer to the street than the front wall of the dwelling house next east, but the testimony shows that the front wall of the apartment house will be on a line with the front porch of the said dwelling house next east.

The questions presented in the case are four in number:

Have the plaintiffs a right of action against the defendants under the circumstances, even conceding that she is about to violate the restrictions of the deed?

Will she violate the restrictions of the deed by erecting an apartment house?

Will she violate the restrictions in the deed by building as close to the front line of her lot as she admits she is about to build?

Ought a court of equity to enjoin the defendant, even if the three preceding questions be answered in the affirmative?

It seems to the court that these facts present a case quite different from the very common case, where a tract of land is sold off in lots to different persons, and covenants exacted from the several purchasers imposing restrictions upon the use of the lots sold in pursuance of a general plan for the mutual advantage of all the owners.

Many cases of the latter sort have been cited by the learned counsel for the defendant, and at least one, *Burton v. Cooper*, 11 Dec. 525 (8 N. P. 406), by the learned counsel for the plaintiffs; but the principles enunciated in those decisions do not assist in the determination of this case as the court sees it.

Counsel for plaintiffs have, however, cited numerous other cases in support of the principle which the court has adopted as determining this case.

Cases like many of those cited, of a violation of restrictions in subdivisions which have a "plan"—that is, whose houses must be of a certain

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value, and be situated a certain distance from the street—have given rise to numerous long and learned opinions on whether or not the restrictions in the deeds are covenants running with the land, or create easements—whether or not such restrictions can be enforced by a vendor against the vendee after the vendor himself has broken the “plan” by making a deed to some one without any restrictive clauses, or by allowing some prior vendee to disregard the “plan;” whether or not prior vendees can enforce an observance of the restrictions on the part of subsequent vendees, and whether or not a court of equity ought to interfere, etc., with many other like difficult questions.

It is the opinion of the court that this case should not be complicated with a discussion of any such propositions, and that all cases dealing with subdivisions with a “plan” ought to be put aside in determining the case in hand. There can be no doubt that where a part only of a tract is sold, either the part sold or the part retained may be made subject to a restriction in favor of the other part, or the two parts may be made mutually servient and dominant; or, where the whole tract is sold in lots, a restriction may be imposed on each lot in favor of all the others; but, admitting all these propositions to be true, they cannot be applied to a solution of the case before us.

The question here is: Can a man who owns but one lot in a subdivision where there is no “plan,” put a restrictive clause in an otherwise absolute deed, and then ask a court of equity to enjoin a violation of the restrictions; or, does it make a case for injunction if, in addition, he has an interest in property that is in the vicinity of the lot sold?

That a deed in fee simple may impose some certain restraints upon a vendee is a very old and well-established principle. A deed may contain a condition against the sale of intoxicating liquors, *Devlin, Deeds* Sec. 963. A condition may be imposed in a deed on the power of alienation in certain cases, as that the land shall not be conveyed before a certain date or to a certain person. *Hunt v. Wright*, 47 N. H. 396 [93 Am. Dec. 451]. A clause in a deed, “Provided, however, and this conveyance is upon condition, that no window shall be placed in the north wall of the house aforesaid, or of any house to be erected upon the premises within thirty years from the date hereof,” is a valid condition. *Gray v. Blanchard*, 25 Mass. (8 Pick.) 284. See also, *Langley v. Chapin*, 134 Mass. 82; *Hayden v. Stoughton*, 22 Mass. (5 Pick.) 528. A great number of other cases might be cited to substantiate this proposition, but it is sufficient that it has been determined by our Supreme Court.

In *Ashland (Vil.) v. Greiner*, 58 Ohio St. 67 [50 N. E. Rep. 99], where a grant of land was made to be used for religious purposes only, and long afterwards the owners of the land conveyed a strip of it to the village of Ashland for a street, the learned court, in its decision, Burket, J., rendering the opinion, uses the following language, page 75:

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"When value is paid for an estate, such stipulation (a stipulation that the estate is to be used only for particular purposes) is construed to be a covenant running with the land, in the nature of a trust, for the uses and purposes expressed in the deed of conveyance, and in case of a breach of the trust, a court of equity will, in a proper action, decree the performance of the trust by confining the uses of the estate to the uses and purposes expressed in the deed. In such cases the restricted use of the estate becomes a part of the consideration, and is consented to by the grantee, and it is no hardship on him and his assigns, to be compelled to observe the covenants contained in the deed."

Again, in *Stines v. Dorman*, 25 Ohio St. 580, where a stipulation in the deed was, that the grantee, his heirs and assigns, should not allow the premises conveyed to be used as a hotel for a certain period, White, J., states this same principle in the following words, page 583:

"The law does not prohibit a grantor from imposing limitations or restrictions on the estate, nor does it require the grantee to take a greater interest than he purchases. If the effect of the stipulation is not to accomplish an illegal purpose, it is lawful; and where it affects the land or the mode of its enjoyment, its effect is to bind all deriving title under the conveyance in which the restriction is found."

The above decisions are sufficient authority to hold that the plaintiffs had the right to insert the restriction in the deed to the defendant, and are entitled to redress if it is broken by the defendant; but it seems to the court that the plaintiff's case is made even stronger by the fact that they have an interest in valuable tracts in the vicinity of the lots sold to the defendant, although not immediately adjacent to it nor in the same subdivision.

In the case of *Reilly v. Otto*, 108 Mich. 330 [66 N. W. Rep. 228], the plaintiffs had sold to the defendants a lot with the express restriction:

"There shall not be placed or erected at any time on said premises any store, but only dwelling houses, etc., and that no store nor saloon shall be erected or placed on said premises," etc. The defendant opened up a saloon, and the plaintiff sought to enjoin him. The plaintiff had sold other lots in the vicinity without any restrictions, and had leased one piece of property in the vicinity for saloon purposes. Plaintiff himself lived a mile and a half away, and owned no ground immediately adjoining the lot in question, although he did own some in the vicinity. The court held that the plaintiff was entitled to an injunction, because a property owner has the right, when he sells his land, to restrain its use by his grantees within such limits as are reasonable, with a due regard to public policy.

Other cases where a grantor, owning land not immediately adjacent to the lot in question, but in its vicinity, was held to have a right to enforce restrictions upon the use to which the one lot was to be put by his grantee, in whose deed proper restrictions had been incorporated,

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are *Smith v. Barrie*, 56 Mich. 314 [22 N. W. Rep. 816; 56 Am. Rep. 391]; *Winnepesaukee Camp Meeting Assn. v. Gordon*, 63 N. H. 505 [3 Atl. Rep. 426]; *Warren v. Lyons*, 22 Ia. 351, and *Whitney v. Railway*, 77 Mass. 359 [71 Am. Dec. 715.]

In conclusion upon this branch of the case, the court is of the opinion that the restrictions contained in the deed in this case are valid and binding ones as between grantor and grantee, and that the complainants have a right to maintain an action because of the violation of the covenants by the respondent.

Coming now to the second question in this case, Is the erection of an apartment house a violation of that clause in the deed to the respondent which requires her to use the premises "for residence purposes only"?

In *Rose v. King*, 49 Ohio St. 213-227 [30 N. E. Rep. 267; 15 L. R. A. 160], the Supreme Court of Ohio gave the following definition of a tenement house:

"A building, the different rooms or parts of which are let for residence purposes by the possessor, to others, as distinct tenements, so that each tenant, as to the room or rooms occupied by him would sustain to the common landlord the same relation that the tenant occupying a whole house, would to his landlord."

This definition was adopted in *Linwood Park Co. v. Van Duzen*, 63 Ohio St. 183-200 [58 N. E. Rep. 576], with the comment that the use of a dwelling as either a lodging house or a tenement house is not a use for the purposes of a private dwelling or residence only.

The words "private dwelling" and "residence" are used as synonyms there, because there is no rule of grammar by which an adjective placed before the first two nouns united by a conjunction modifies both nouns. It modifies the one only before which it is placed.

It seems to the court that these last words from *Linwood Park Co. v. Van Duzen*, *supra*, ought to settle the question here.

Suppose that a dwelling had been built on this lot and it was about to be used for a tenement house, as defined by our Supreme Court. The language of *Linwood Park Co. v. Van Duzen*, *supra*, just quoted, is clear that this would not be a use of the dwelling for the purposes of residence only.

Now, there is no difference between a tenement house and an apartment building, except that one is for poor people and the other is for well-to-do people. The definition of a tenement house by the Supreme Court applies with exactness to an apartment house.

Hence if the erection of a tenement house on this lot would violate this provision of the deed, so also would an apartment house violate it.

The third question in this case is: Will the defendant violate her covenant if she erects a building so that its front wall will be on a line

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with the front of the porch of the dwelling house on the lot next east of her premises?

In the case of *Graham v. Hite*, 93 Ky. 474 [20 S. W. Rep. 506], the covenant reads:

"It is further agreed that the building or buildings that shall be erected on said lot shall be of brick and set the same distance back from Third street as the house now erected on the southwest corner of Third and Oak streets."

A building was begun with its front wall on a line with the front wall of the house referred to, but it had a porch projecting, and it was held that the front wall of the house must be on a line with the front wall of the next house, and that the front of the porch was not the front of the house.

In *McGuire v. Caskey*, 62 Ohio St. 419 [57 N. E. Rep. 53], it is held that building a porch inside the limit is not violating the restrictions in the deed, and, although there is a case, *Ogontz Land & Imp. Co. v. Johnson*, 168 Pa. St. 178 [31 Atl. Rep. 1008]; holding the contrary, still this court is of the opinion that the preponderance of the authority, as well as the reason of the thing, is in favor of holding that the defendant ought not to build the front wall of any structure upon her premises nearer to the street than is the front wall of the next house east.

The fourth and last question in this case is, whether or not an injunction suit is the proper action to be brought by these plaintiffs.

No case cited by the defendant's counsel is to the effect that a court of equity will refuse to enjoin the threatened violation of a restriction in a deed. There probably is no authority to that effect. The most that the cases cited by the learned counsel hold is, that it is discretionary with the chancellor to enjoin or not. Whatever may be the rights, however, of the plaintiff in the various cases, which, as pointed out at the beginning of this question, may arise where there is a subdivision with a "plan," it seems to this court that between the grantor and grantee in a deed there can be no question but that a court of equity ought to enjoin the threatened infraction by the grantee of a covenant in his deed. *Lloyds v. London*, 2 DeG. J. & S. 568.

The right of the plaintiff to an injunction is in fact determined by our Supreme Court in the case of *Ashland v. Greiner*, 58 Ohio St. 67-75 [50 N. E. Rep. 99], so that the question is not a new one in this state. The holding in the Ohio cases is to the effect that the original grantor and his heirs have the right to apply in such cases to a court of equity.

The decree of the court is, that the defendant is enjoined from erecting any sort of building except a dwelling house upon the lot in question, and from constructing the front wall of the residence which she may erect on said lot any closer to the front line of her lot than is the front wall of the dwelling house on the lot next east of her premises.

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BANKRUPTCY—LIMITATION OF ACTIONS—SUBSCRIPTIONS.

[Licking Common Pleas, February, 1906.]

JOHN A. ROEBLING SONS CO. v. SHAWNEE VALLEY COAL & IRON CO. ET AL.**1. STOCKHOLDERS' LIABILITY—CLAIMS NEED NOT BE PRESENTED TO EXECUTOR.**

It is not a condition precedent to the enforcement of stockholders' liability against the estate of a decedent that the claim be presented to the executor.

2. STATUTE OF LIMITATIONS RUNS AGAINST UNPAID STOCK SUBSCRIPTIONS FROM ACT OF INSOLVENCY OF CORPORATION—STATUTE IN FORCE AT TIME OF INSOLVENCY GOVERNS.

As to a claim for unpaid stock subscriptions, the statute begins to run and a right of action accrues from the appointment of a receiver or other act of insolvency on the part of the corporation and the claim would be barred after the time prescribed by the statute in force at the time of the appointment of a receiver or such act of insolvency fixing the time within which such actions must be brought.

3. STOCK IN INSOLVENT CORPORATION NOT AN ASSET IN HANDS OF EXECUTOR—SOLE DEVISEE NOT ACCEPTING STOCK DEVISED TO HIM GENERALLY CANNOT BE HELD PERSONALLY.

Under a will providing that all debts of the estate shall first be paid, the stock of an insolvent corporation comes into the hands of the executor as a liability, and not as an asset; but where the executor is also the sole devisee, and the stock is not specifically mentioned in the will, and is not accepted by the devisee, the statutory liability cannot be enforced against such devisee personally.

4. BANKRUPT NOT DISCHARGED FROM STOCKHOLDERS' LIABILITY OR FROM UNPAID SUBSCRIPTION WHERE CLAIM NOT SCHEDULED, NO NOTICE SERVED ON CORPORATION, AND CLAIM NOT LIQUIDATED.

A discharge in bankruptcy is not effectual to discharge a claim for stockholders' statutory liability or unpaid stock subscription, where it appears that the claim was not properly scheduled, and no notice of the bankruptcy proceedings served on the corporation, and there is no showing that the claim was ever liquidated.

5. PURCHASER AT PAR NOT LIABLE FOR UNPAID SUBSCRIPTION.

A stockholder purchasing stock at par is entitled to the presumption that the original subscriber therefor paid for the stock in full, and a claim on account of unpaid subscription will not lie against such purchaser at par.

[Syllabus by the court.]

A. A. Stasel, for plaintiff.

Hunter & Hunter, Kibler & Montgomery, J. B. Jones, Jonathan Rees and Flory & Flory, for defendants.

SEWARD, J. (Orally.)

John A. Roebling Sons Co. v. Shawnee Valley Coal & Iron Company et al. is submitted to the court upon certain issues raised by the answer of the executrix of the estate of Charles W. Snider, the answer of the executors of the estate of John C. Larwill, and the answer of John C. Hamilton, and, I might also say, the issue as between Mrs. Catherine Snider and the plaintiff in the case. A reply is filed to these various

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answers, denying certain allegations, and the case was submitted to the court upon the issues raised by the answers and the reply.

This is a suit to collect unpaid subscriptions to the capital stock of the Shawnee Valley Coal & Iron Company and to enforce the statutory liability of the stockholders of said company. The suit was commenced June 18, 1901. The amended petition was filed February 13, 1902.

First, as to the issues raised upon the claim against the Snider estate, and against Mrs. Snider personally: It is said the claim was never presented to Mrs. Snider, executrix of her husband's estate, and that, by reason thereof, the estate is not liable. She was appointed executrix January 4, 1898. She finally settled the estate May 5, 1900. Was it a necessary prerequisite to the suit to present the claim upon which the suit is predicated to this executrix? As to the statutory liability, this would seem to be impossible.

Revised Statutes 6108 (Lan. 9647) provides that no executor nor administrator shall be liable to the suit of a creditor until after the expiration of eighteen months from the date of the bond, and provides for the presentation of the claim. Counsel are familiar with that section of the statute. The object of the presentation of the claim before suit is, that the personal representative may have notice of the demand, its amount and nature, and right to accept and pay the same without suit, and the right to make known his intention to contest by a rejection of the claim. The claim for statutory liability is, from its very nature, unliquidated; its extent cannot be ascertained except by proceedings in court such as these are. The assets of the corporation are primarily liable for its debts, after which any balance of indebtedness not exceeding the double liability is to be made up from the solvent stockholders. Can it be possible for a creditor to be definite and certain as to the amount of liability of any stockholder to him until after the assets have been applied to the payment of creditors, and the solvent stockholders have been ascertained? If he cannot be so definite and certain, how can proof of claim by affidavit be made? Judge Shauck, in *Wanz v. Hotel Co.* 1 Cir. Dec. 63 (1 R. 105), holds that it is not necessary to present such a claim; that it is not necessary to make presentation to the administrator or executor, that from the very nature of it, it is impossible to present it.

There seems to be no reason, however, why the claim for unpaid subscription should not have been presented to the administrator or executor of the estate. That is a liquidated claim.

It is claimed that suit was not brought within two years after Mrs. Snider gave bond as executrix, and that therefore the suit cannot be maintained against her as executrix. This two years statute was passed April 8, 1898, and was amendatory of Rev. Stat. 6113 (Lan. 9652), which provides a limitation of four years for like actions. The

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answer of Mrs. Snider alleges that the corporation went into the hands of a receiver May 9, 1898; that it was then insolvent, and then ceased to be a going concern. What effect did the appointment of a receiver have upon the statute of limitations? Did it not have the effect to give a right of action to the creditor, which he could then pursue, and thus to start the statute of limitations to running? In a former opinion upon this subject in this case, I cited *Younglove v. Lime Co.* 49 Ohio St. 663 [33 N. E. Rep. 234]. I will only read the second syllabus of the decision:

"When, however, the property of the corporation has been placed in the hands of an assignee in bankruptcy, or insolvency, or of a receiver appointed on its dissolution to wind up its affairs, or in some such way has been put in process of application to the payment of its debts, the creditors may proceed against the stockholders without first reducing their claims to judgment against the corporation, and the statute will run in favor of the stockholders from such time."

So that a right of action accrued as against this estate on May 9, 1898, when this institution went into the hands of a receiver—became insolvent. The statute of limitations of two years was passed April 8, 1898, and was then in force, and was the statute governing when this right of action accrued, if it did accrue, when this concern went into the hands of a receiver. Mrs. Snider was appointed executrix January 4, 1898. She settled as such executrix April 3, 1900. No claim was presented and no suit was brought until June 18, 1901, more than three years from the date of giving bond by the administratrix.

The case of *Bevitt v. Diehl*, 70 Ohio St. 484 [72 N. E. Rep. 1154], which went to the Supreme Court from Springfield, where the reply set up the four years statute of limitations, which was in force, and a demurrer was interposed to that reply, it was overruled; the judgment of the court of common pleas in that regard was sustained by the circuit court; the case went to the Supreme Court and was there affirmed; and so the Supreme Court has held that where the four years statute was in force that it was applicable to such cases. The Supreme Court affirmed that case without report, and so the court has had to rely upon the record and the brief that are furnished.

As to the personal liability of Catherine Snider growing out of the provisions of the will of her husband: The will gives her all his property absolutely, providing that she shall first pay from any moneys of the estate all debts and funeral expenses. It is claimed by the plaintiff that she accepted under the will; that this stock became hers, and that she is therefore liable in this action. Mrs. Snider denies that she ever accepted said shares. This stock, at the time of the appointment of Mrs. Snider, was not an asset of the estate. By virtue of the insolvency of the company, the stockholders' liability, and the unpaid subscription,

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it became a liability of the estate, instead of an asset. The stock is not specifically mentioned in the will. It is claimed, however, that her acceptance under the will bound her to pay any liability attaching to the stock whether she accepted the stock or not, or whether she received any benefit from the stock or not. That is, a person who accepts under a will that provides that that person shall pay the debts of the estate, must pay the debts whether he gets enough property out of the estate or not. There is no doubt but what if this stock had been specifically devised, and she accepted the stock, she might be held liable as a stockholder; as where real estate is devised under certain conditions, then the devisee who accepts the devise is bound by the conditions, and must assume any burden attached to the land by the devise. But in this case, the liability remained the liability of the estate, and if the bar of the statute had not fallen would still be enforceable against the estate. So I find as to the estate of Charles W. Snider that the bar of the statute has fallen, and the estate is not liable to the creditors of the corporation, and that Catherine Snider never accepted the stock and she is not therefore liable for the burdens attaching to it.

As to the issue between the plaintiff and John C. Hamilton: John C. Hamilton pleads his discharge in bankruptcy. The reply admits that Hamilton made an application praying to be discharged; that he received a certificate of discharge, but denies that he is discharged from this claim. It says that Hamilton did not name the Shawnee Valley Coal & Iron Company as a creditor; nor did he include the amount due said company for unpaid subscription; that he did not cause nor seek to cause his liability upon his stock to be liquidated by said bankruptcy court or any other court. It is shown that in the list of his creditors he stated a possible stockholders' liability to the corporation. From what debts would the proceeding release him? The bankruptcy law (ed. 1898), Sec. 17, page 25 (30 U. S. Stat. at L. 550), reads as follows:

"Debts not affected by a discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

It is claimed that no notice was given to the Shawnee Valley Coal & Iron Company, or to the plaintiff in this case, which is now seeking to

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enforce the statutory liability of stockholders. Section 58, page 41, provides as to notice:

"Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts," etc.

It is claimed that no notice was ever given of the application of John C. Hamilton to the Shawnee Valley Coal & Iron Company, or the creditors, for discharge; and the testimony shows in this case that this company, while it was not a going concern, held meetings of the stockholders, or directors; that Mr. Ward was secretary, after these proceedings were commenced, or at the time; and he takes the stand and testifies that he never got any communication, and Mr. Smith says that none ever came to him, and that he never got any communication or notice. So that I find that no notice was served upon the Shawnee Valley Coal & Iron Company; that it received no notice; and I find also that the indebtedness was not properly scheduled, if scheduled at all.

What effect do the proceedings have upon debts not properly scheduled? It will not effect a discharge, unless the creditor had actual notice. Loveland, Bankruptcy Sec. 292, p. 624:

"A discharge will not release a bankrupt from debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. Where the court has jurisdiction and the claims have been placed upon the schedule, or if omitted from it and the creditors have had notice or actual knowledge of the proceedings, the debt, if provable, is released by the discharge.

"The rule established by the present act is quite different in many respects from that under the act of 1867. Under that act, if the notice required by the statute had been duly published, the discharge was held to bar the debt, although the name of the creditor was not placed on the schedule nor notice given to him. That is not the case under the present bankruptcy law. Unliquidated claims cannot be proved; they must first be liquidated. Loveland, Sec. 128, p. 245.

"A claim to be proved in bankruptcy must be liquidated. The present bankruptcy act provides for liquidating unliquidated claims in the following words: 'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

"Unliquidated claims which may be liquidated and proved under this provision are numerous and varied. Familiar examples are dam-

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ages for breach of executory contracts, damage for breach of covenants in a contract and stockholder's liability." And other claims that it is not necessary to mention.

The law provides that a person can go into the court, and insist that the claim be liquidated by the court, and has a right to have such proceedings had in regard to that claim as will liquidate it, and ascertain the amount due upon it as against the bankrupt.

Section 63, p. 44, Subd. *b* of the bankrupt law provides:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Therefore, they cannot be proved before liquidation, as a matter of course. That would necessarily follow.

Rouse, In re, 40 Bull. 220-226, is cited to the court by both sides in the argument of this case, and it is claimed to bear out both contentions. It is a case in the U. S. district court, N. D., E. D., before Harold Remington, referee.

"1. A stockholder's statutory liability in an insolvent Ohio corporation is not only a liability created by statute, but is also a claim founded upon an implied contract, and, as such, is a provable debt against the estate of the bankrupt stockholder, whenever the circumstances are such that a stockholder's liability suit would lie.

"2. It is an unliquidated claim, and, upon application to the court, the court will direct the manner of its liquidation.

"3. But the court will not proceed to direct the manner of liquidation unless application is made to it therefor.

"4. In cases of stockholder's double liability, the court may direct that a stockholder's liability suit be instituted by the creditor making the application, or that an already pending suit in the state court be maintained, for the purpose of liquidating the claim; or, if the facts are simple and undisputed, may itself undertake to determine the amount provable as the bankrupt stockholder's liability, and to whom the same is payable."

The court say on page 226:

"Now it seems to me that the real question is not whether the stockholder's liability is a provable debt or not, but is rather whether or not it is an unliquidated debt, and, if an unliquidated debt, how the court shall direct it to be liquidated.

"I can see easily that in many cases the bankruptcy court will direct the claimant, after he has filed his proof of debt, to proceed to liquidate the claim in a stockholder's liability suit before admitting the same to proof or allowing it. But I can also understand how in some cases, where the facts are all admitted, and are all simple and not complicated, the court will itself make the computation."

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Then he says:

"It might be so simple a question that the referee could, upon the submission of proper evidence, himself liquidate the respective claims of corporate creditors, but the claimants who here appear, neither present any testimony as to the probable debts of the corporation, solvency of the stockholders, nor any other data except such as appear in their depositions for proof of debt, nor do they make application to the court in accordance with Sec. 63b [that is the section that I just read] for the court to direct the manner of liquidation. In fact, they refuse to do or attempt to do these things. This being so, they stand in the position of claimants who, having debts which are no doubt provable, are yet unwilling to comply with the statutory requirements for proof of them, and for this reason and not because their claims are in their nature unprovable the court, and referee, will not allow them to participate in the election of trustee, and will postpone the admission of their claims to proof and allowance."

So that this court holds in this case that while the debt may be provable, it must be proven. The testimony does not show that the double liability or unpaid subscription was properly scheduled. It does not show notice to the corporation; it does not show that the claim was ever liquidated; and, therefore, the discharge of Hamilton was not effectual to discharge this claim.

As to the John C. Larwill estate, unpaid subscription and double liability:

As to unpaid subscription on the Larwill stock: It is claimed that Larwill paid full face value without knowledge that the stock was issued for less than par. Cook, Corporations (4 ed.) Sec. 50, says:

"A *bona fide* purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a person has a right to rely on the representations of the corporation that the stock is paid up. Difficulty sometimes arises in determining what will constitute a sufficient representation that the stock is paid up. A representation by the corporate agents that the full par value will not be required is insufficient. The word "nonassessable," stamped or printed or written on the face of the certificate, is not a sufficient representation that the stock is paid up, so as to protect a *bona fide* purchaser thereof, where the certificate also shows that only 20 per cent has been paid thereon. Where, however, a statement is made on the face of the certificate that it is paid up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability."

In a note it is said:

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“ ‘Here the appellant is a *bona fide* holder of shares upon which, no doubt, there was a false statement made by the company, of which he had no knowledge, and as to which he was under no obligation to inquire.’ ”

He could rely upon the certificate of stock; if it did not show that it was not all paid up, he could rely upon it, and the presumption was, that it was paid.

“ ‘A purchaser or assignee of stock which has not been fully paid does not become liable to the corporate creditors for the unpaid balance, where the stock has been issued as fully paid, [as it was in this case, as is shown by the certificate] and he has acquired the same in good faith, and without notice that it has not been fully paid.’ ”

Also, Sec. 257 of this same book:

“ ‘The question whether the purchaser of shares is bound to take notice that the stock he purchases is not fully paid for is a serious and complicated one. The better opinion, and the one most in accord with the usages and demands of trade is, that, where one buys stock in open market, in good faith, and without notice that the subscription price thereof has not been paid up, such a purchaser cannot be held liable to pay the unpaid balance of subscription.’ ”

That is likewise held in *Rood v. Whorton*, 74 Fed. Rep. 118 [20 C. C. A. 332; 46 U. S. App. 6], and *Coleman v. Howe*, 154 Ill. 458 [39 N. E. Rep. 725; 45 Am. St. Rep. 133].

There is nothing upon the face of the certificates to indicate that par has not been paid by the person to whom the stock was originally issued, and the purchaser in good faith of the stock on the market from a holder of the certificate has a right to rely upon the presumption that the stock subscription was paid in full. Larwill's executors claim that he paid full value without knowledge. There is no testimony showing that Larwill had knowledge that only 30 per cent of the stock was paid, and he is entitled to the presumption that it was paid in full, and cannot be held liable for the unpaid subscription. But, this principle has no application to stockholders' liability, and the court holds that he is liable to an assessment on the stock liability.

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EVIDENCE—JURY—GAMBLING—TRIAL.

[Franklin Common Pleas, May 14, 1906.]

HARRY FIELDS V. STATE OF OHIO.**1. RULES OF COURT EXCLUDING ALL EXCEPT CERTAIN CLASSES VIOLATE CONSTITUTION.**

Rules of a police court which refuse admittance to the trial of an accused to all except "officers of the court, witnesses under subpoena, wife, mother or father of prisoner during trial, persons having special permission from the court, and newspaper men," deny to the accused a public trial under the guaranty of the constitution of the state, (Sec. 11, Art. 8) and a trial conducted under such rules is erroneously conducted.

2. TRIAL NOT PUBLIC BUT NOT PREJUDICIAL TO DEFENDANT WILL NOT PREVENT REVERSAL OF JUDGMENT.

That the exclusion of the general public from the trial of an accused, contrary to the provisions of Sec. 11, Art. 8 Const. did not prejudice the accused, will not prevent a judgment rendered against the accused at such trial from being reversed for error on account of the denial of his constitutional right.

3. EXCLUSION OF NEGROES FROM JURY VIOLATES CONSTITUTION OF THE UNITED STATES.

To exclude persons from serving on a jury solely on account of their race or color is to deny the equal protection of the laws contrary to the fourteenth amendment of the constitution of the United States.

4. EXPERT TESTIMONY AS TO GAME OF "CRAPS" ADMISSIBLE ON THE PART OF THE STATE.

In a prosecution for gambling, expert testimony as to the game commonly known as "craps" is admissible on the part of the state.

[Syllabus approved by the court.]

ERROR to police court of the city of Columbus.

C. D. Saviers, for plaintiff in error.

J. M. Butler, for defendant in error.

DILLON, J.

The plaintiff in error was charged in the police court with gambling, tried before a jury, convicted and sentenced. He prosecutes error to this court.

After a demurrer had been filed and overruled to the affidavits, the cause was called for trial, April 4, 1906. Before the commencement of the trial the defendant objected to the manner in which the same was about to be conducted and continued his objection at the conclusion of the trial, by reason of the following rules of the said police court:

"The following persons *ONLY* shall be admitted to the lobby:

"1. Officers of the police court.

"2. Witnesses under subpoena.

"3. Wife, mother or father of prisoner during trial.

"4. Persons having special permission from the court.

"5. Newspaper men."

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While the presumption is, that the court enforces its own rules at its trials and that, in the absence of a contrary showing, the same were in accordance therewith, the actual enforcement of this rule is further proven by numerous affidavits of friends of the accused, who applied for admission and were refused. The plaintiff in error claims, therefore, that he was denied a public trial in accordance with Sec. 11, Art. 8 of the constitution of this state. The question, therefore, is fairly presented as to whether or not the admission only of the persons limited in the rule is sufficient to grant the defendant a "public trial" within the meaning of the constitution. By this rule it will at once be apparent that all the world was excluded from the trial except the officer of the court, the witnesses, and wife, mother or father, newspaper men, and those persons who had special permission from the court. My consideration of this question has led me to determine without reserve that this is not a public trial. Public trial is one to which any proper person may have admittance, providing there is reasonable room therefor.

The rule, therefore, which excludes all the world but a certain designated few, unquestionably violates the provisions of the constitution with respect to a public trial. The object of the rule doubtless is commendable as being intended to exclude those young and tender in years, those habitues or loungers whose presence might keep out the friends of the one accused, and those, who by reason of their personal habits as to disease, cleanliness, etc., should be denied admission. Restrictions of this kind unquestionably would be valid.

There is a dearth of decisions upon the subject for the reason, no doubt, that it has seldom happened that any restrictions have been made in this country which would permit of the question being raised. In our own state we have one decision, that of *Kirk v. State*, 14 Ohio 511, decided in 1846. In that case, the trial itself was public and without restriction, but after the jury had retired, the presiding judge, at the jury's request, went to their room and explained his charge again to them in the absence of the defendant and his attorney. So jealous was the Supreme Court of this guaranty of the constitution of a public trial, that the case was reversed and the cause remanded for a new trial. In the case of *People v. Murray*, 89 Mich. 276 [50 N. W. Rep. 995; 14 L. R. A. 809; 28 Am. St. Rep. 294], that court decided in 1891, that a public trial had not been granted the accused by reason of a rule which provided that the officer at the door of the court room should "see that the room is not overcrowded but that all respectable citizens be admitted and have an opportunity to get in when they shall apply."

One of the reasons given for so declaring this rather reasonably appearing rule to be invalid was, that the persons applying were not personally known to the door-keeper and were not required to get certificates of character as to their respectability. It seems manifest, there-

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fore, that a requirement that every one accused of crime shall have a public trial means that all the world may freely attend within the reasonable capacity of the court room, and that the only exclusion can be those of the classes such as I have before mentioned. To make a rule which admits simply a certain limited class and bars the whole world except those coming within that classification, is clearly a violation of this provision of our constitution.

It is argued on behalf of the state that as a matter of fact the defendant had a fair, impartial trial and that he was not prejudiced by reason of this error. I grant the contention but I cannot grant the conclusion which counsel for the state draw therefrom, that even though this error existed, there being no prejudice to the defendant in his trial, the judgment should be affirmed. It is true that generally speaking mere errors which occur at a trial should not be considered as grounds for reversing a judgment, unless those errors are such as were material and prejudicial. This court inclines to the view that sometimes our reviewing courts have lost sight of this principle and oftentimes purely on mere abstract theory, have found error and assumed too freely the duty of reversal, even though it be apparent that without such error the result of the trial would have been the same. But when one of the constitutional guaranties as to personal rights is involved, the law does not force upon the one so deprived, to show that any actual injury has been suffered by him by such deprivation of his constitutional right, but on the other hand, on principle and on grounds of public policy, once it is shown that his constitutional right has been violated, the law will presume that he has suffered an injury. This public policy and principle are based upon the theory, that in such a case the whole body politic suffers an injury when the constitutional safeguard enacted to protect the right of a citizen has been violated in the person of the humblest.

The second complaint made by the plaintiff in error is, that expert evidence was received upon the subject of the gambling game known as "craps." Laymen who are called to serve as jurors are not presumed to be familiar with the various games of chance which are by law made unlawful, and, therefore, the subject is not one of such common occurrence as would preclude expert testimony. In all such cases the state has a right to call those who are familiar with such games to explain what acts are embraced in and constitute the particular game complained of. I find no error, therefore, by reason of the admission of such evidence.

The plaintiff further complains that the court erred in overruling his motion to set aside the finding and verdict, for the reason that the jury commissioners had excluded from the jury wheel the names of all persons of the African race, for the sole reason that they were persons of that descent. The court overruled this motion and refused to grant

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the defendant below an opportunity to prove his claim as made in the motion. While this motion probably was viewed by the court below as wholly without merit, and while this court is not inclined to take seriously to the claim made, it is pertinent to observe that this question has been passed upon by the Supreme Court of the United States in a number of cases in which it has held the right of a defendant to be heard as to such claim. See *Virginia v. Rives*, 100 U. S. 313-323 [25 L. Ed. 667]; *Wood, In re*, 140 U. S. 278 [11 Sup. Ct. Rep. 738; 35 L. Ed. 505]; also the recent decision of the Supreme Court of the United States in the case of *Martin v. Texas*, decided February 13, 1906, in which the court held that a discrimination against the negroes because of their race in the selection of grand and petit jurors is forbidden by the fourteenth amendment to the constitution of the United States, and that if one accused files his motion and at the same time offers to prove by witnesses the truth of his claim so made, the court must hear it, and refusal so to hear the offered evidence is error.

It is well settled, therefore, in this country that whenever by any action of a state, whether made through its legislature or through its courts, or through any of the executive or administrative officers thereof, it is made to appear that all persons of the African race are excluded from serving as jurors solely because of their race or color, the equal protection of the laws is denied contrary to the fourteenth amendment to the constitution of the United States.

The judgment of the police court, therefore, is reversed, and the cause is remanded to that court with instructions to grant the plaintiff in error a new trial.

CHARGE TO JURY—DAMAGES—EVIDENCE—VERDICT.

[Superior Court of Cincinnati, General Term, March, 1906.]

Hosea, Hoffheimer and Littleford, JJ.

(Judge Littleford of the Hamilton common pleas, sitting in place of Judge Ferris.)

CINCINNATI TRAC. CO. v. LOWELL WOOLEY, AN INFANT.

1. VERDICT OF JURY NOT DISTURBED BY REVIEWING COURT UNLESS CLEARLY WRONG.

A verdict of a jury will not be disturbed as against the weight of evidence unless it is clearly wrong. A mere doubt or difference of opinion in the minds of the reviewing court will not be sufficient.

2. WHETHER FENDER OF CAR, PROPERLY LOWERED, WOULD HAVE PASSED OVER PLAINTIFF IS QUESTION FOR JURY.

In an action for damages caused an infant by being run over by a traction car the question whether or not the fender of the car, properly lowered, would have passed over or caught the child, is one for the jury to be determined by the primary facts in evidence, and is not a proper one for a witness, even an expert.

Superior Court of Cincinnati.

3. ERROR TO INSTRUCT AS TO SPECIAL DAMAGES WHEN NOT PLEADED NOR IN EVIDENCE—TIME LOST BY INFANT AND DIMINISHED EARNING CAPACITY NOT PROPER SUBJECTS FOR INSTRUCTIONS IN ACTION BY THE INFANT.

In an action for damages for injuries suffered by an infant, it is error for the court to instruct the jury as to special damages by way of expense incurred, where there is nothing in the pleading or the evidence relating thereto; it is also erroneous to charge as to time lost by reason of the injury and diminished earning capacity in the future where no emancipation is shown, and no instruction given as to the right of the parent to wages earned during minority.

[Syllabus approved by the court.]

ERROR to special term.

Kittredge & Wilby, for plaintiff in error.

B. M. Clen Dening, for defendant in error.

HOFFHEIMER, J.

The action below was for damages suffered by defendant in error, an infant aged seven years. The action was brought by the father as next friend, and the verdict was for defendant in error, in the sum of \$10,200. In due course, judgment was entered on the verdict, and these proceedings in error are had to reverse the proceedings below. Several grounds are assigned, and it is claimed that the verdict is against the weight of the evidence; that the court erred in the admission of testimony, and that there was error in the charge of the court relating to the measure of damages.

We have carefully read the entire record in this case, and although it was argued with much force that the verdict was against the weight of the evidence, we do not feel that we can interfere with the verdict on that account. While we may differ with the jury and while we may even doubt the correctness of its finding, we must be guided by the rule established in Ohio. In *McGatrick v. Wason*, 4 Ohio St. 566, 575, Judge Thurman said:

"Should we disturb this finding? If it is clearly wrong, we must do so; if we only doubt its correctness, we must let it alone."

In *French v. Millard*, 2 Ohio St. 44, 53, the court said:

"We are not satisfied that the verdict of the jury was right. But this is not enough. A mere difference of opinion between the court and the jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact."

We cannot say that the verdict was clearly wrong, and, therefore, cannot say that the verdict was against the weight of the evidence.

It is claimed that the court erred in permitting the following questions to be asked and answered:

"Q. If the fender of this car had been dropped before the car reached the boy where he was lying on the ground, you may state

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whether or not, this boy of the size you then observed, would have passed under the fender?

"A. He could not."

Plaintiff in error duly objected to the admission of this testimony, and noted his exception, and we think that the court erred in overruling the objection of the plaintiff in error, and in permitting witness to answer the question. The matter was not one that was susceptible of any expert testimony, and it was one of the questions that the jury had to determine for itself under the evidence. The jury had all of the primary facts upon which to form an intelligent opinion, and arrive at a correct conclusion without the use of extrinsic opinions. The fact to be determined was not obscure, and the jury was as capable of determining the question and forming an opinion as an expert. *Railway v. Shultz*, 43 Ohio St. 270, 283 [1 N. E. Rep. 324; 54 Am. Rep. 805]; *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647, 656; *Circleville v. Sohn*, 11 Circ. Dec. 193 (20 R. 368, 373).

We likewise think that inasmuch as the action was brought by the next friend on behalf of the infant, the court erred in that part of its general charge, relating to the measure of damages. The court said in its charge:

"If the jury under these instructions, considering all the testimony as I have here directed, should find for the plaintiff, it would be your duty to assess damages. And in that event, your verdict should be in such an amount as will compensate for the injuries which the plaintiff has actually sustained, directly resulting from the negligence and want of care on the part of the defendant. This would include the pain and suffering that he has endured; time lost by reason of his injury; the loss that may accrue to him by reason of his diminished capacity to earn money, in the event that you find that his injuries are such as to diminish his capacity to earn money. You would be justified also in taking into consideration in your verdict all the expense to which he has been put in consequence of the injury; and if you find for the plaintiff, the jury would be justified in awarding him such damages as may fairly compensate him for the injury."

The petition did not set forth any expense by way of special damages, nor was there any evidence on this point. The charge that the jury would be justified in considering expense, was erroneous, because it permitted the jury to speculate upon the question of damages. *Andrews v. Railway*, 8 Circ. Dec. 584 (19 R. 699); *Pitts. C. & St. L. Ry. v. Zepperlein*, 1 Circ. Dec. 22 (1 R. 36).

That part of the charge quoted, which permitted damages for "time lost by reason of the injury," was also misleading, and also permitted the jury to indulge in speculation. There was no evidence of time lost by the minor (Voorheis, Measure of Damages, Personal In-

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juries, Par. 36), and even if there was, the earnings of the minor, as no emancipation was shown, properly belonged to the parent.

That part of the charge that permitted the jury to award damages "for the loss that may accrue to him by reason of his diminished capacity to earn money in the future" was likewise prejudicial to plaintiff in error. If any cause of action accrued for diminished earning capacity during minority, it was in the parent and not in the infant. *Rosenkranz v. Railway*, 108 Mo. 9 [18 S. W. Rep. 890; 32 Am. St. Rep. 588].

Although there was no testimony as to expense or time lost, it could not be said the jury under the charge did not indulge in speculation on these various items, concerning which the court had so fully charged, and it could not be said that it did not consider the diminished earning capacity of the infant; or that it did not include in its calculations the ten years, more or less, that remained up to the time of this child's majority. If anything was allowed by way of damages for these various elements included in the charge, it would be impossible to discover it or separate it from the verdict. The question of damages, it can be readily seen, was an exceedingly important element in the case, and as the instructions in regard thereto were misleading and erroneous, and upon a point material to it (*Lowe v. Lehman*, 15 Ohio St. 179), we are of opinion that the error was prejudicial to plaintiff in error, and we conclude that the judgment must be reversed, verdict set aside and a new trial granted, and it is so ordered.

Hosea, J., concurs.

LITTLEFORD, J.

I concur in this opinion and think the judgment below ought to be reversed for the additional reason that the verdict is against the weight of the evidence.

DAMAGES—EVIDENCE—NEGLIGENCE.

[Superior Court of Cincinnati, General Term, June, 1906.]

Ferris, Hosea and Hoffheimer, JJ.

CINCINNATI TRAC. CO. v. MARY ANN MOELLER, ADMX.

1. CONTRIBUTORY NEGLIGENCE—ORDINARY CARE FOR CHILD UNDER FOURTEEN IS SAME DEGREE OF CARE A CHILD OF LIKE AGE USUALLY EXERCISES.

A charge to a jury in an action for damages for injuries to a child which resulted in its death, to the effect that, being under seven years of age, as a matter of law the child could not be guilty of contributory negligence, is erroneous. No such rule obtains in Ohio. A child under fourteen is held to the exercise of such care as children of its own age ordinarily exercise under the same or similar circumstances, and the question of contributory negligence is, under this rule, one for the jury.

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2. ACTION FOR WRONGFUL DEATH—EVIDENCE MUST POSITIVELY SHOW WHO BENEFICIARIES OF DECEDENT ARE, THEIR CIRCUMSTANCES, ETC.—NO PRESUMPTION WILL BE SUFFICIENT.

In an action for damages for wrongful death, the jury must determine from the evidence who the beneficiaries of the decedent are and the pecuniary loss sustained by each. Hence, evidence that a sister of the decedent existed at the time of the death will not be sufficient basis for an award of damages for her benefit, where proof is not offered as to her existence at the time of trial nor of her age, circumstances, etc. The presumption that she still exists will not suffice.

3. EVIDENCE—TESTIMONY AS TO INJURIES ADMISSIBLE TO SHOW MANNER OF ACCIDENT THOUGH FACT OF INJURIES ADMITTED.

In an action for damages for wrongful death, where it was admitted by the defendant that the death was due to the injuries received, it is not error to admit testimony as to the nature of the injuries where such testimony may throw light on the allegations in the petition as to how the accident occurred or in what respects defendant was negligent.

[Syllabus approved by the court.]

ERROR to special term.

George Warrington, for plaintiff in error.

Clore, Dickerson & Clayton, for defendant in error.

HOFFHEIMER, J.

The action below was for damages. Plaintiff's intestate, Vincent Moeller, was killed by one of defendant's cars on May 21, 1903. The petition substantially alleges that the child who was under six years of age, and who was too young to exercise any discretion, attempted to cross Hunt street in Cincinnati, near the intersection of Spring street, and while in the act of crossing, one of the cars of defendant company, struck him. The allegations of negligence are:

That the motorman of the car, was running at a reckless and unlawful rate of speed, without keeping any lookout over said track, and without keeping his car under control or ringing the gong; that he failed to drop the fender of said car, or to check its speed, and to apply the brake after the peril of the child was or could have been discovered. The answer of the company was in substance a general denial. The verdict was for the plaintiff for \$2,000. The cause is now heard on error.

It is claimed among other things, that the court erred to the prejudice of plaintiff in error, in giving, at the instance of the plaintiff below, and over the objection of plaintiff in error, the following special charge:

"The court instructs the jury that the deceased being under seven years of age, could not be guilty of contributory negligence, in attempting to cross the track of the railway at the time."

And also that the court erred in refusing to give the following special charges requested by the defendant below, and to the refusal of which, exception was also noted:

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"If you find that in placing himself in front of defendant's cars, Vincent Moeller did not exercise that degree of care which children of his age are accustomed to exercise under the same or similar circumstances, and that such act upon his part, was the proximate cause of the accident, then I charge you the plaintiff cannot recover, and your verdict must be for the defendant."

And also that the court erred in refusing to give the following special charge:

"If you find that the act of Vincent Moeller in placing himself in front of defendant's car, was the direct and proximate cause of the injuries which resulted in his death, then your verdict must be for the defendant."

We think the action of the court in respect to these special charges, was erroneous. The difficulty seems to have been occasioned by the view taken by the learned trial judge, that a child under seven years of age, was incapable, as matter of law, of exercising discretion. At common law, it is true, a child under seven, could not be charged with contributory negligence, and in several of our Supreme Court Reports, there appear certain *dicta* from which it appears the common-law rule was more or less favored. No doubt, relying upon these *dicta*, and *Lake Erie & W. Ry. v. Mackey*, 53 Ohio St. 370 [41 N. E. Rep. 980; 29 L. R. A. 757; 53 Am. St. Rep. 640], the court below assumed that the common-law rule still obtained in Ohio. In the course of its opinion, in *Lake Erie & W. Ry. v. Mackey*, *supra*, the court quoting from Bishop, says that a child under seven years of age, is presumed incapable of crime and it would seem the principle should have application to a case of negligence. If *Lake Erie & W. Ry. v. Mackey*, *supra*, is closely scanned however, it will be found to have turned, so far as the question of contributory negligence is concerned, on a question of pleading merely, and the decision bore upon the presumptions to be indulged in when considering the pleadings. At page 380 of that case, we find:

"The criticisms are, * * * that the presumption of contributory negligence arising from the facts stated" in the petition "is not overcome by the proper averments."

At page 380, Judge Spear says:

"It is insisted that the petition fails to state a cause of action, and that the trial court, therefore, erred in overruling a general demurrer to that pleading."

And again at page 383, the court says:

"Nor is the petition faulty in that it does not sufficiently negative the presumption of contributory negligence."

And again at page 384, the court says:

"It follows that the averment (immaturity) is sufficient

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to rebut any legal presumption of contributory negligence from other facts appearing in the petition."

It was accordingly held that the trial court properly overruled a demurrer to the petition. An analysis of this case, therefore, shows that the decision involved related to a question of pleading, and had nothing whatsoever to do with the case when submitted on the evidence. This is further evidenced in the syllabus.

In *Cleveland Term. & Val. Ry. v. Heiman*, 9 Circ. Dec. 222 (16 R. 487), it was held that in an action for negligently killing a boy, the allegation that he was only twelve years old and of immature judgment, repels the presumption of contributory negligence that might otherwise be apparent on the face of the petition as to make it vulnerable to a demurrer; and at page 227, the court goes on to say (speaking with reference to *Lake Erie & W. Ry. v. Mackey*, *supra*):

"It is quite apparent from these authorities that there are two principles deducible. First, the rule by which the conduct of children of a given age (under fourteen) is to be judged. Second, that when such age affirmatively appears in the petition for the purpose of asserting a cause of action, the cause shall not be defeated because of the apparent contributory negligence. The allegation of age (being under fourteen or of any given age under that, or of immature years) has the effect usually of removing the imputation of neglect; or in other words, the effect of the presumption, which would otherwise arise, is avoided. But, it must be equally apparent that the removal of this presumption by allegation of age is limited to pleading only, and cannot be held to supply proof so far as recovery is concerned. * * * So that the rule in Ohio clearly is, that any person under the age of fourteen, because that seems to be the age required by the Supreme Court, is held to that degree of care, to relieve them of contributory negligence, that would be attributed to persons of his age and experience."

What was said in the opinion in *Lake Erie & W. Ry. v. Mackey*, *supra*, therefore, is scarcely authority for the proposition announced by the court below. On the other hand, in *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 282 [20 N. E. Rep. 466; 3 L. R. A. 385; 15 Am. St. Rep. 596], the Supreme Court, speaking of contributory negligence, announced the rule as to children generally, and in this syllabus it is said:

"In the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them, is that degree of care which children of the

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same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances."

This rule appears to be established not only in Ohio, but generally, by the overwhelming weight of authority. See *Shearman & Redfield, Negligence Par. 73*. That the common-law rule above adverted to, is discarded in Ohio, is shown by the court's opinion in *Rolling Mill Co. v. Corrigan, supra*, wherein Judge Williams said at page 288:

"We have found no decision of this court upon the subject of contributory negligence of infants, or the measure of care required of them. Elsewhere the decisions are conflicting. Each of three different rules on the subject, has found judicial sanction. One rule requires of children, the same standard of care, judgment and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes, a third, and more reasonable, rule has grown into favor, and is now supported by the great weight of authority, which is, that a child is held to no greater care, than is usually possessed by children of the same age."

And again at page 290, the court said:

"We think it a sound rule, therefore, that in the application of the doctrine of contributory negligence to children, in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults, and, while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them, is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise, under similar circumstances."

In *Rolling Mill Co. v. Corrigan, supra*, therefore, the question as to whether the child exercised such care as a child of the same age, of ordinary care, is accustomed to exercise under similar circumstances, was left to the jury under proper instructions. True, in *Rolling Mill Co. v. Corrigan, supra*, the child was over seven (it was under the age of fourteen) but as the doctrine announced in the *Corrigan* case is unqualified and makes no age limit, we are unable, in view of the rule laid down in the syllabus, to create an exception, and say that a child under seven is to be conclusively held to be incapable of a negligent act, directly contributing to injury received by it. This rule seems to have obtained in the case of *Ludtke v. Railway*, 24 O. C. C. 120, 126. That case arose several years after *Lake Erie & W. Ry. v. Mackey, supra*, and the court (Haynes and Mooney, JJ.) said:

"This child, it appears, was a child about six years of age, or a little older, and the question whether the child was negligent, if he was old enough to be capable of a negligent act, if that was the claim made in the case, should have gone to the jury."

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It is said:

"That the law is, that a child under six years of age is incapable of committing an act of negligence; it has not sufficient knowledge, but there are cases that do not take that view,—that hold to the contrary. I do not find, or at least I have not seen, any cases in Ohio, touching that point."

The question as to whether a child is incapable of a negligent act, was accordingly held one for the jury. See also *Mt. Adams & Eden Park Inc. Ry. v. Doherty*, 6 Circ. Dec. 810 (8 R. 349); *Kentucky Hotel Co. v. Camp*, 97 Ky. 424 [30 S. W. Rep. 1010] (child under seven years of age); *Wendell v. Railway*, 91 N. Y. 420; *Citizens Electric Ry. L. & P. Co. v. Bell*, 26 O. C. C. 691. Affirmed by the Supreme Court without report *Citizens' Elec. Ry. L. & P. Co. v. Bell*, 70 Ohio St. 482.

In *Atchason v. Traction Co.* 90 App. Div. 571 [86 N. Y. Supp. 176], it was held:

"There can be no recovery whether a child is *sui juris* or not, if it did not exercise the same care as children of the same age under the same or similar circumstances."

If, then, we are correct in our deductions, as the circumstances of this particular case were such as necessarily devolved carefulness upon the child, as the evidence fairly put in question the due exercise of care on the child's part, the jury should have been permitted to consider whether the plaintiff although a child of tender years, exercised such care as children of its own age are accustomed to exercise under the same or similar circumstances. If it did not, and the failure so to do was the proximate cause of the injury, there could be no recovery. The question was fairly raised by the traction company when it requested the charge:

"If you find that the act of Vincent Moeller in placing himself in front of defendant's car, was the direct and proximate cause of the injury which resulted in his death, then your verdict must be for the defendant."

As stated under the circumstances and the evidence, the burden was upon the plaintiff to show it exercised due care. The refusal of the court, however, to give the charges of plaintiff in error, above set out, and the giving of the special charge requested by plaintiff below, foreclosed any or all consideration by the jury of the defects, if any there were, in plaintiff's case. It shut out absolutely any consideration of the carefulness of the child. Defendant in error contends that the instructions asked by plaintiff in error above referred to, were plain instructions on the subject of contributory negligence, and as there was no such plea in the case, there was no authority to charge the jury upon that proposition. This argument, however, is not sound. The plain-

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tiff was bound to show by his case that he did not cause the injury; in other words, he was bound to show the exercise of ordinary care. *Cincinnati v. Frazer*, 9 Circ. Dec. 487 (18 R. 50). See also *Robison v. Gary*, 28 Ohio St. 241; *Balt. & O. Ry. v. Whitacre*, 35 Ohio St. 627; *Beech*, Contr. Neg. (2 Ed.) Sec. 427; *Hays v. Gallagher*, 76 Pa. St. 136, 140.

At page 250 of the bill of exceptions, it appears the court charged the jury:

"That a motorman ordinarily has the right to assume that pedestrians will exercise ordinary care to avoid danger when crossing the street, but as this presumption does not exist as to young children under seven years of age, he must take precautions accordingly."

For the reasons above given, the charge was erroneous, and if the law were otherwise, an instruction of this character would practically make the traction company an insurer of the safety of children under seven years of age, upon the streets.

We think there was error in refusing the special charge offered by defendant before argument, regarding the measure of damages, which charge limited damages to the pecuniary injury of Mary Ann Moeller. The charge was based upon *Cincinnati St. Ry. v. Altemeier*, 60 Ohio St. 10 [53 N. E. Rep. 300], and was correct. The court likewise erred in the general charge (record, pages 252, 253) wherein the jury was charged to assess damages suffered by the mother and sister of deceased. The error grew out of the failure of plaintiff formally to prove the existence and circumstances of the sister at the trial. The evidence shows the sister was alive at the time of the injury, but there is no evidence as to whether she was living at the time the jury assessed damages for her. The court proceeded on the theory, that, as it appeared the sister was alive at the time of the injury, the law would presume she was still alive, and that the burden would be on defendant to refute the presumption. A presumption, however, is never a substitute for proof of an independent and material fact. *United States v. Ross*, 92 U. S. 281, 285 [23 L. Ed. 707].

While the administrator in an action of this character, for wrongful death, under the statute, is a mere nominal party, nevertheless, the allegation of beneficiaries is material to its maintenance, and it is necessary to prove their existence at the trial. The action is strictly for their benefit, and even though they may have been in existence at the time suit was filed, *non constat* but that some of them or all of them may have died before the trial. Suppose the rule were otherwise, and the burden were on defendant to prove the nonexistence of the beneficiaries. Suppose the next of kin were alleged to be alien nonresidents (residents of Italy let us say, as was the case in *Pitts. C. C. & St. L. Ry. v. Naylor*, 73 Ohio St. 115); it would be an awkward burden for a defendant, un-

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der such circumstances, to prove the circumstances or existence of the next of kin. And yet, such would be the result of the rule contended for by defendant in error.

But we think the rule is sufficiently clear in *Cincinnati St. Ry. v. Altemeier, supra*. In that case it was said: In actions of this character "under Secs. 6134, 6135 [Lan. 9673, 9675] Rev. Stat., 'the jury may give such damages, not exceeding \$10,000, as they may think proportionate to the pecuniary injury * * * to the persons respectively for whose benefit such action shall be brought.'" And at page 14, the court said:

"But how shall this pecuniary injury to the survivors be ascertained and measured by the jury? Manifestly it must be determined by the jury from the evidence in the case, and not merely by guess. Such facts should be established in the case by evidence as will enable the jury to fix the amount of the pecuniary loss to each person entitled to share in the recovery, and the jury should confine the verdict to the amount of loss so proven. To warrant a recovery at all, it must be shown by the evidence that in the usual course of events in life the beneficiary would have received financial aid from the deceased had he lived, and the approximate amount of such aid."

And again, at page 16, the court goes on to say:

"The jury should be governed by the circumstances of each case as shown by the evidence, and return a verdict for such an amount as the evidence shows the reasonable pecuniary loss to be, and if no pecuniary loss is proven, the verdict should be for the defendant."

Here then, even if the hypothesis of the court could be indulged, and the sister of decedent presumed to be alive at the time of trial, as the record is devoid of testimony as to the age, health or other circumstances of the sister, what basis was there for the jury to find pecuniary loss as to her? As to this beneficiary, therefore, the verdict was not determined on evidence, and was mere guess work.

Under the allegations in the petition, we do not think that the court erred in admitting testimony as to the child's injuries, notwithstanding the death of the child was admitted to be due to injuries received. It was admissible because the nature of the injuries sustained, tended to prove some of the allegations of the petition. For example: The charge that there was a failure to drop the fender; likewise, the charge that there was a failure to check the speed of the car, or to apply the brake. See 2 Wigmore, Evidence Sec. 1158.

It was also urged that the court erred in refusing to permit one of the plaintiff in error's witnesses to testify as to a remark made by the child's sister after the accident, and concerning the act of the child in running in front of the car. The action of the court was proper, because the sister's remark was a mere account of a past transaction, and

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was not a part of the *res gesta*. *Clev. C. & C. Ry. v. Mara*, 26 Ohio St. 185.

For the above reasons, we conclude that the judgment below must be reversed, verdict set aside and new trial ordered.

Ferris and Littleford, JJ., concur.

PLEADING—STOCKHOLDERS' LIABILITY.

[Licking Common Pleas, February, 1906.]

EDWARD UMSTEATTER ET AL. V. NEWARK SAV. BANK CO. ET AL.

1. TIME OF ENFORCEMENT OF STOCKHOLDERS' LIABILITY GOVERNS THOSE WHO ARE LIABLE.

In an action to enforce the statutory liability of stockholders, a demurrer will lie to an allegation in the answer of a defendant, that he was not a stockholder at the time when the debt mentioned in the petition was contracted. Those who are stockholders at the time of the enforcement of the liability shall be liable in such an action.

2. CLAIM NEED NOT BE PRESENTED TO ADMINISTRATOR OF DECEASED STOCKHOLDER.

In an action to enforce stockholders' liability, it is no defense for the administrator of the estate of a deceased stockholder that no verified claim has ever been presented to, and allowed by, him.

3. CREDITOR OF INSOLVENT CORPORATION MAY SUE TO ENFORCE STOCKHOLDERS' LIABILITY BEFORE RECEIVER ASCERTAINS THAT ASSETS ARE INSUFFICIENT.

The statutory liability of stockholders in a corporation is not an asset in the hands of a receiver and, while an action by a creditor to enforce such liability should be postponed until the assets in the hands of the receiver are found to be insufficient to pay the debts, a creditor may bring his action before such fact is ascertained.

4. EXECUTOR MUST STATE IN DEFENSE THAT ESTATE HAS BEEN FULLY SETTLED AND STATUTE OF LIMITATIONS HAS RUN.

An allegation in an answer by the executor of a deceased stockholder, in an action to enforce the statutory liability against the estate of the decedent, that no claim was ever presented for allowance, without allegations that the estate has been fully settled and that the statute of limitations has run against the claim, does not constitute a defense.

5. BANK ORGANIZED UNDER OHIO LAWS—DOUBLE LIABILITY ENFORCIBLE AGAINST STOCKHOLDERS.

Where the insolvent corporation is a bank organized under Ohio laws, an allegation that a defendant stockholder is not liable for anything beyond the subscription price of his stock does not state a good defense.

[Syllabus approved by the court.]

Wayne Collier, for plaintiffs.

F. Black, J. B. Jones, Hunter & Hunter, Flory & Flory and Norfell & Norfell, for defendants.

SEWARD, J. (Orally.)

The case of Edward Umsteatter et al. v. The Newark Savings Bank Co. et al. is a suit to enforce the statutory liability of stockholders. The suit originally was a suit to enforce statutory liability, and also to

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enforce the payment of unpaid subscriptions to the capital stock. The question as to the unpaid subscriptions to the capital stock has been dismissed, and there is, therefore, only one question before the court, and that is as to the statutory liability of stockholders.

There are several answers and there are demurrers to each one of them. The court will have to take them in their order. Each seems to be different from the other. There is a demurrer to the second defense of the answer of E. L. Weisgarber, administrator. The second defense is as follows:

"The said E. L. Weisgarber says he denies that the said W. G. Taafel was a stockholder in the said Newark Savings Bank at the time the debt mentioned in first and second cause of action was contracted."

This is an important feature in the case, and the Supreme Court has held in *Brown v. Hitchcock*, 36 Ohio St. 667, the last case in that volume, that the liability attaches when the contract is made with the creditor of the corporation. This is a decision by a divided court, two of the judges rendering a dissenting opinion. That was under the old statute—Section 3258 Rev. Stat.—which reads as follows:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

That was passed in 1844, I believe. (52 O. L. 44.) That was the old statute, and remained in force until 1902, when it was amended by the legislature. It reads:

"Section 3259. The term 'stockholders,' as used in the preceding section, shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another.

"Section 3260. A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation," etc.

This section is in the Revised Statutes of 1880. In this decision by the Supreme Court, wherein the judges differed as to the law governing such questions, the majority of the court holding that the persons who were stockholders at the time the contract was made with the corporation are the persons who are liable on the stock, two dissenting opinions were rendered, one by McIlvaine and one by Johnson, that that is not the law in Ohio, and holding that those persons who were stock-

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holders at the time the liability is enforced were liable—that they are the persons who are contemplated by the statute. The legislature, in 1902, amended that statute, and I think in view of that decision of the Supreme Court, although, of course, that does not appear. It is Rev. Stat. 3258 (Lan. 5202):

“The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable against them [that is, against the stockholders, and not against the corporation] shall be deemed and held liable, equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held.”

And so the legislature has fixed the stockholders who are liable a creditor as those “who are the holders of its shares at a time when the debts and liabilities are enforceable against them,” conforming to the dissenting opinion of McIlvaine and Johnson in *Brown v. Hitchcock*, *supra*. So as to this allegation that Taafel was not a stockholder at the time that the debt mentioned in the first and second causes of action in the petition was contracted, the demurrer to that must be sustained. If it were not for this amendment, as the court views it—the recent amendment to the statute by the legislature—the demurrer would have to be overruled as to that branch.

Then there is a demurrer to the third defense:

“The said E. L. Weisgarber says that the said W. G. Taafel died on or about the twenty-eighth day of July, 1904, long before the commencement of this action. That he, the said E. L. Weisgarber, was on the —— day of August, 1904, duly appointed and qualified as administrator of the estate of said W. G. Taafel and has been acting as such ever since. That the plaintiff has not nor has anyone else ever presented to him as such administrator for allowance the said claim set out in the petition, properly verified according to law or any claim whatever.”

This court held in *Roebeling Sons Co. v. Coal & Iron Co.* 17 Dec. 8, that it was not necessary to present a claim against the administrator for statutory liability, holding, as the circuit court so held in *Joecken v. Savings & Banking Co.* 24 O. C. C. 605, and the court will not refer to that further.

For fourth defense to the first and second causes of action:

“The said defendant says that in a suit commenced by L. P. Schaus in the common pleas court of Licking county, Ohio, being case No. 13025, long before this suit was commenced, A. A. Stasel was duly appointed by the said court as receiver of the said bank and qualified as such and has been and still is acting as such receiver. That said receiver was ordered by said court to take charge of all of the property, assets, accounts and claims of every description of said bank and con-

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vert the same into money. That whatever is due from the said W. G. Taafel, or from said defendant as his administrator is an asset of said bank, and belongs to the said receiver, and it is his duty to collect the same and apply the same as directed by the said court in the said case. That said plaintiff has no right or authority to maintain the said action."

As far as the second cause of action is concerned, in the petition, this answer would be impervious to a demurrer, but the statutory liability of stockholders is not an asset of the corporation; it is a liability to the creditors, if after the payment of the debts there is not sufficient remaining due to pay the creditors, then they may proceed under the statutory liability of the stockholders. The receiver might bring an action to enforce the statutory liability after it is ascertained that the assets will not pay the corporation creditors. But, he is not the only person. A creditor may do the same thing under the statute; and to say that because a receiver has been appointed, a creditor has no right to proceed, would be flying in the face of the statute, as the court views it; and while this probably ought to be postponed until an ascertainment is made by the receiver as to what the assets of the corporation will be, the court is without authority to control that. And so, the demurrer to these various defenses is sustained

As to the answer of Judge Hunter as executor of Reinhart Scheidler:

A demurrer is interposed to the third and fourth defenses of this answer.

"3. That neither claim set out in the petition was ever presented to the said executor of said Scheidler for allowance, as required by law."

The court has just passed upon that (*Roebbling Sons Co. v. Coal & Iron Co.* 17 Dec. 8), and sustained the demurrer.

"4. That said defendant was appointed executor May 4, 1903, and filed his first account as such in November, 1904, and was granted an extension of time for one year from the filing of said account, to settle said estate."

The court does not think that allegation makes any defense. And the demurrer is sustained to that.

A demurrer is interposed to the second defense in the answer of Henry Scheidler. The second defense reads as follows:

"That he denies that he was a stockholder, or in any manner connected with the said The Newark Savings Bank Company, prior to January 15, 1904."

Under this section of the statute, if he were a stockholder at the time of the enforcement of the liability, it would make no difference. He would still be liable as a stockholder on the statutory liability. The demurrer to that is sustained

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"4. That he is not indebted in any sum for the stock he held on the fifteenth day of January, 1904, and that is all he ever held."

I suppose that is intended to be to the second cause of action. But a demurrer is interposed to it, and it will have to be sustained.

A demurrer is interposed to the second, third and fifth defenses in the answer of Dortha M. Weippert, executrix of Christian Weippert, deceased. The second defense is, that no claim was presented to the administratrix within the time required by law, and it is not alleged that she has fully settled up the estate, and does not plead the statute of limitations; and the demurrer to that is sustained. And to the third defense: It alleges the appointment of a receiver, the pendency of that suit; the court has passed upon that, and the demurrer to that will be sustained.

"Fifth defense. For fifth defense to the said first cause of action, the said defendant says that the Newark Savings Bank is a corporation organized under the laws of Ohio, and said defendant denies that the holders of the stock in said corporation are liable to anything beyond their subscription thereto."

There is a special statute on the subject of banks, and the court thinks the demurrer to that defense is well taken.

The next is as to the answer of Laura J. Jones; a demurrer is interposed to the fourth defense. "Said defendant says that in a suit now pending in the common pleas court of Licking county, Ohio, being case No. 13025, wherein L. P. Schaus is plaintiff"—that is the same defense that the court has sustained a demurrer to.

The demurrer to all these defenses will be sustained.

JUDGMENTS—LIENS—GAMING.

[Union Common Pleas, April Term, 1906.]

F. O. PENNY v. CLARENCE M. SANDERS ET AL.

1. JUDGMENT AGAINST PERSON CARRYING ON BUCKET SHOP NOT NECESSARILY A LIEN ON PREMISES.

A judgment obtained against a person carrying on a "bucket shop" for money lost in the venture, is not a lien upon the premises of another in which such business was conducted; but only becomes such lien upon recovery of judgment against the owner who knowingly permits the use thereof for such purposes.

2. INNOCENT PURCHASER OF REALTY, OPERATED AS BUCKET SHOP, BEFORE ACTION BROUGHT TAKES PREMISES DISCHARGED FROM LIEN OF JUDGMENT.

Where such owner sold the real estate in which the illegal business was carried on to an innocent purchaser before action is brought to subject the same to the payment of said judgment, such innocent purchaser takes the same discharged therefrom.

[Syllabus approved by the court.]

W. H. Vanwinkle and Hoopes & Robinson, for plaintiff.

J. L. Cameron, for defendants.

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Partner cannot confess for firm. *Freeman* Judgments 545, 546, 549; *Rosebrough v. Ansley*, 35 Ohio St. 107.

A judgment without the record showing a cause of action against the judgment debtor is void though entered by consent. *Müller Sons Carriage Co. v. Miller*, 11 Circ. Dec. 455 (21 R. 207); See *Spoors v. Coen*, 44 Ohio St. 497 [9 N. E. Rep. 132].

Enforcement of lien against owner of building wherein gambling is permitted. *Binder v. Finkbone*, 25 Ohio St. 103; *Mullen v. Peck*, 49 Ohio St. 447 [31 N. E. Rep. 1077]; *State v. McMahon*, 3 Dec. 15 (1 N. P. 350); *Cin. H. & D. Ry. v. Duckworth*, 1 Circ. Dec. 618 (2 R. 518); *Lester v. Buel*, 49 Ohio St. 240 [30 N. E. Rep. 821; 34 Am. St. Rep. 556]; *Bellinger v. Griffith*, 23 Ohio St. 619.

Secret liens are not favored. *Wilkins v. Irvine*, 33 Ohio St. 138.

The statute has made damages growing out of the sale of intoxicating liquors a lien upon the premises where sold. *Mullen v. Peck*, 49 Ohio St. 447 [31 N. E. Rep. 1077]; *Bellinger v. Griffith*, 23 Ohio St. 619.

DOW, J.

The plaintiff, [in *F. O. Penny v. Clarence M. Sanders, James H. Sanders and B. L. Talmadge*] in his second amended petition, alleges that on and prior to May 5, 1905, John M. Sanders, Percy H. Sanders, and Jesse S. Kagay were the owners of certain lots and the buildings thereon, in the village of Richwood.

That from November 11, 1904, to December 6, inclusive, George A. Baker, under the business name of the George A. Baker Company had carried on the business of gaming and gambling in a room in said building.

That on May 3, 1905, plaintiff recovered a judgment against said George A. Baker for \$776.25, with interest from December 6, 1904, and for costs of suit, for money lost by him at gaming and won by said Baker.

That said judgment was for money lost by plaintiff in said property, then owned by said John M. Sanders, Percy H. Sanders and Jesse S. Kagay, which business was carried on therein, with their knowledge.

That on May 8, 1905, and after said judgment attached as a lien upon said property, said last-mentioned parties conveyed said real estate to the defendants, Clarence M. Sanders and James H. Sanders.

Plaintiff asks that said real estate may be ordered sold, and from the proceeds, his said judgment be paid with interest and costs.

ANSWER.

The defendants file answer to said second amended petition and, for defense, say:

They admit that on May 5, 1905, and for some time prior thereto John M. Sanders, Percy H. Sanders and Jesse S. Kagay were the owners of the real estate described and that on May 25, 1905, they conveyed

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the same, for value, to said defendants, Clarence M. and James H. Sanders, and deny that at the time of such conveyance plaintiff's pretended judgment was a lien upon the same, and allege that whatever judgment the plaintiff may have was illegal and void, and deny that the George A. Baker mentioned and the George A. Baker Company was one and the same

That on December 24, 1904, the plaintiff brought his action in this court against the George A. Baker Company, setting forth that it was a partnership firm, doing business in Ohio and asking a recovery for certain moneys claimed to have been lost by dealing in stocks, grain and futures with said company; that summons was served on J. L. Voght, who was in charge of said firm's business; that said Baker was not sued as an individual, neither was he made a party as such; that while said action was pending, and on May 3, 1905, said Baker filed in said cause a paper by which he confessed that he was indebted to plaintiff in the sum of \$776.21 and asked to have judgment rendered against him in plaintiff's favor, which was done.

Defendants aver that by reason thereof said judgment is illegal and void, so far as it affects the rights of either of defendants.

Further, said answer denies each and every allegation in said amended petition, not admitted by said answer.

Plaintiff's reply is simply a denial of the new matter set out in said answer.

This cause was submitted upon the testimony and presents some nice questions for determination.

The court, from the evidence, finds the following state of facts:

1. That from November 11, 1904, to December 6, 1904, one George A. Baker was carrying on what is termed a "bucket shop" in the property mentioned under the style of the George A. Baker Company.

2. That during all that time and until May 25, 1905, John M. Sanders, Percy H. Sanders and Jesse S. Kagay were the owners of the property in which said business, and of which they had knowledge, was being carried on.

3. That George A. Baker was not the tenant of the then owners, but had subleased the room from Carl Algower, the tenant.

4. That on May 3, 1905, the plaintiff recovered a judgment against said George A. Baker for the sum of \$776.25 for moneys by him lost in said bucket shop venture, carried on by said Baker.

5. That this action was begun on July 1, 1905, and that prior thereto, to wit on May 25, 1905, the defendants, Clarence M. and James H. Sanders, purchased said real estate for value without knowledge of plaintiff's claim of a lien thereon

LAW.

With these facts found from the evidence, the only question left for determination by the court is, whether the judgment of plaintiff

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against George A. Baker of May 3, 1905, attached as a lien upon the property in question under the statute, because if it did so attach, the transfer by the three owners subsequently to Clarence M. and James H. Sanders would not release the property therefrom.

At common law, a person who has entered into an agreement, founded upon a consideration illegal, immoral or against public policy, a court will not aid him, but will leave the parties where they have voluntarily placed themselves. *Thomas v. Cronise*, 16 Ohio 54; *Hooker v. DePalos*, 28 Ohio St. 251.

This is upon the theory that the suppression of such immoral and illegal transactions will be more effective by leaving the parties thereto where they have voluntarily placed themselves, than by affording either a remedy against the other.

In this transaction, the plaintiff and George A. Baker entered into an unlawful engagement, one contrary to good morals and against public policy. Knowing that one or the other would lose, plaintiff lost.

The legislature recognizing the rule at common law, have enacted statutes allowing any person who, by any bet or wager, loses money or other property, to recover by civil action the money or property with costs of suit, if brought within six months. Revised Statutes 4270 (Lan. 7046).

These statutes being in derogation of the common law are to be strictly construed and not extended by implication beyond the particular cases of illegality for which they provide.

The statutes prohibiting bucket shops and gambling in stocks, etc., Rev. Stat. 6934a, 6934a-1 (Lan. 10577, 10578), *et seq.*, nowhere, in direct terms, provides for the maintenance of actions of this kind.

Revised Statutes 6934a-1 (Lan. 10578) provides for a penalty against the person maintaining such place, and also Rev. Stat. 6934a-5 (Lan. 10582), provides for a like penalty against the owner of a building who knowingly permits such business to be carried on therein, and also provides that such penalty shall be a lien upon the premises on or in which such unlawful acts are carried on or permitted, but it nowhere provides, in direct terms, for the recovery of money lost in such transaction, nor that the property where such transactions are carried on shall be subject to the lien of a judgment obtained against a person carrying on such business therein or thereon. *Kahn v. Walton*, 46 Ohio St. 195 [20 N. E. Rep. 203].

Revised Statutes 6934a (Lan. 10577) passed April 15, 1882, provides that all contracts for options on grain, etc., where the intent of the parties thereto is, that there shall not be a delivery of the commodity sold, but only a payment of differences by the parties losing, upon the rise and fall of the market, are gambling contracts and void, and it is claimed that by reason of this provision a cause of action has accrued in favor of plaintiff under Rev. Stat. 4270, 4275 (Lan. 7046, 7051), and

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against the defendants as averred in this action, and that the property and building on and in which the transaction occurred is under Rev. Stat. 4275 (Lan. 7051) subject to the payment of the judgment.

Revised Statutes 4275 (Lan. 7051) provides that,

“The property, both real and personal, of a defendant against whom a judgment is rendered under this chapter, either for fines, costs, or to recover money, or other thing of value, lost or paid, shall be liable therefor, without exemption, and such judgment shall be a lien thereon until paid; if the owner of the building in which the money was lost knowingly permits it to be used for gaming purposes, such building, and the real estate upon which it stands, shall be liable therefor in the same manner.”

The case of *Trout v. Marvin*, 24 O. C. C. 333, has been cited as one in which a construction has been given to this section. In that case, Trout recovered a judgment against Clifford & Gossman for money staked and lost by gambling in a room belonging to Marvin, which the defendant Marvin had full knowledge was being used for the purposes of gaming; that said judgment could not be made by execution from said defendants; an action was brought against Marvin, who, at the time of bringing the action against him, as well as at the time the cause of action against Clifford and Gossman accrued, was the owner of the building in which the illegal transaction occurred. The prayer was for a decree, declaring said judgment a lien on said real estate and for an order for the sale thereof to satisfy said judgment. The court found and adjudged that the premises of Marvin, in which the gaming was carried on was liable for the judgment of Trout.

This case was affirmed by our Supreme Court, as well as by the United States Supreme Court.

The case at bar presents, however, a question not an issue in *Trout v. Marvin*, *supra*. In that case, Marvin was the owner of the property, not only at the time of the gambling transaction carried on therein, but continued to be the owner until after the decree against him, adjudging the judgment of Trout to be a lien thereon.

In this case, the present owners bought the premises some months before the present action was instituted and without knowledge of the judgment of plaintiff against Baker.

The action against Baker was a personal action merely, no remedy being sought against the real estate. Did the personal judgment against Baker create a lien upon the property of defendants in this action?

This question was not decided in the Marvin case and so far as this statute is concerned, has not been passed upon to my knowledge.

ADAIR LAW.

Under the Adair Liquor Law, which provides for the recovery of fines and for damages against one, who, by the sale of intoxicating liquors, has injured another in person, property or means of support,

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the provisions are very similar to the gaming sections just considered.

Revised Statutes 4363 (Lan. 7238) reads:

"For all fines, costs, and damages assessed against any person in consequence of the sale of intoxicating liquors, * * * the real estate and personal property of such person, of every kind, without exception or exemption, except under Sec. 5430 [8958]; and such fines, costs, and damages shall be a lien upon such real estate until paid."

This is identical with the first clause of Rev. Stat. 4275 (Lan. 7051).

Then Rev. Stat. 4364 (Lan. 7239) provides that if a person rents or leases a building or premises for the sale of intoxicating liquors, or permits the same to be so used, such building or premises, so leased, used or occupied, shall be liable for and may be sold to pay all fines, costs and damages assessed against any person occupying the same.

This section is similar to the second clause of Rev. Stat. 4275 (Lan. 7051).

In both cases, the judgment against the person carrying on the business shall be a lien upon all his property and it shall be subjected to payment without exemption. But as against the owner, if he is not the person carrying on the business, the property occupied is only liable for such fines and damages.

In the case of *Bellinger v. Griffith*, 23 Ohio St. 619, the Supreme Court holds in passing upon the questions of lien arising under Rev. Stat. 4363, 4364 (Lan. 7238, 7239), that the lien of a judgment recovered thereunder is limited to the real estate of the judgment debtor. And the section which declares the real estate not owned by the judgment debtor, but in which the business was carried on, is liable for the payment of the judgment, does not create a lien thereon, but merely authorizes it to be subjected to the payment of the judgment in a suit instituted against the owner for that purpose.

And the court further holds that until the commencement of such suit against the owner, the judgment creditor acquires no interest in the property and if before such suit is brought, the property has been sold and conveyed in good faith for value it cannot be subjected to the payment of the judgment.

Following this decision, which has never been reversed nor distinguished, the pleadings admitting the sale and transfer, in good faith, to the present owners long before this action was begun, a finding will be made in favor of Clarence M. and James H. Sanders.

If, however, at the time of bringing this action, the property had been still owned by John M. and Percy H. Sanders and Jesse S. Kagay, or if it had been charged and proven herein that the conveyance was without consideration and made to avoid plaintiff's claim, the judgment would have been in favor of plaintiff and in accord with the case of *LaRoche v. Brewer*, 5 Circ. Dec. 432 (8 R. 508).

Exceptions are noted and appeal bond fixed at \$100.

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LIMITATION OF ACTIONS—LOTTERY.

[Franklin Common Pleas, April 17, 1906.]

HARRINGTON V. HALLIDAY ET AL.

1. ONE INTERESTED IN PROFITS OF LOTTERY COMPANY MAY NOT RECOVER UNDER REV. STAT. 4271 (LAN. 7047).

One who has purchased shares or debentures in a company operating a lottery and is directly interested in the business and the profits derived therefrom may not recover under Rev. Stat. 4271 (Lan. 7047) what he has expended, being *in pari delicto* with the others interested in such company.

2. ACTION TO RECOVER MONEY—CLAIM ALLOWED BY RECEIVER IS DEFENSE PRO TANTO.

Where one has invested in the debentures, so-called, of a lottery company and, on the winding up of the affairs of such company through a receiver, has presented his claim for such investment to the receiver and had it allowed, the acceptance by him of such allowance will constitute a defense *pro tanto* to an action brought by him to recover under Rev. Stat. 4271 (Lan. 7047).

3. ONE-YEAR LIMITATION ON ACTION TO RECOVER MONEY INVESTED IN LOTTERY.

The limitation of actions brought under Rev. Stat. 4271 (Lan. 7047) to recover money invested in a lottery together with exemplary damages is one year and not six years.

[Syllabus approved by the court.]

T. D. Alberry and S. H. Bright, for plaintiff:

Cited and commented on the following authorities. *State v. Investment Co.* 64 Ohio St. 283 [60 N. E. Rep. 220; 83 Am. St. Rep. 754; 52 L. R. A. 530].

Requirements of plea of confession and avoidance. *Medill v. Collier*, 16 Ohio St. 599; *Corrigan v. Rockefeller*, 8 Dec. 14 (5 N. P. 338); *Brundred v. Rice*, 49 Ohio St. 640 [32 N. E. Rep. 169; 34 Am. St. Rep. 589]; Phillips, Code Pl. 69, 71, 235; *Bartholomew v. Bentley*, 15 Ohio 659 [45 Am. Dec. 596]; *Bartholomew v. Bentley*, 1 Ohio St. 37; Beach, Priv. Corp. Sec. 162; Giaunque's Manual for Assignees 45, 46; *Haskins v. Alcott*, 13 Ohio St. 210; *Cooper v. Rowley*, 29 Ohio St. 547; *Mason v. Shay*, 5 Dec. Re. 194 (3 Am. L. Rec. 435); *Huntington v. Attrill*, 146 U. S. 657 [13 Sup. Ct. Rep. 224; 36 L. Ed. 1123]; *Courson v. Courson*, 19 Ohio St. 454; *Seymour v. Railway*, 44 Ohio St. 12 [4 N. E. Rep. 236]; *Phillips v. Sture*, 1 Code Rep. 60; *Arrieta v. Morrissey*, 1 Abb. Pr. (N. S.) 439; *Grover v. Morris*, 73 N. Y. 473.

J. T. Holmes, T. J. McCoy and Arnold, Morton & Irvine, for defendants.

BIGGER, J.

The case is submitted to the court upon general demurrer by the plaintiff to the second, third and fourth defenses of the answer of the defendant. The action is brought by the plaintiff under the provisions of Rev. Stat. 4271 (Lan. 7047), to recover the sum of \$1,116.30, alleged

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to have been expended by the plaintiff, and paid to the defendants, and that the money was expended by the plaintiff in the purchase from defendants of certain hazards or chances, called by the defendants' certificates, and commonly known as debentures. Plaintiff's prayer is, that she may recover the said sum, \$1,116.30, together with \$500 as exemplary damages as authorized by the said Rev. Stat. 4271 (Lan. 7047). The defendants answered jointly. The first defense is a general denial. The second defense and the first defense demurred to sets forth the organization of a company known as the Cincinnati Debenture Company under the laws of the state of West Virginia, and the purposes of its organization and the issue to the company of a certificate by the secretary of state of this state authorizing it to do business in Ohio. That the name of the said corporation was afterwards changed to the Ohio Debenture Company, and the location of its principal office changed from Cincinnati to Columbus. That from its organization the said company engaged in the business of selling certificates or debentures, and that it continued in such business until about March 10, 1901.

Defendants then stated that certain certificates or debentures were purchased by the plaintiff and that the plaintiff paid at the time of the purchase for each of said tickets or debentures, the sum of five dollars, as an initial membership fee for the first month, and that she thereby became a member and owner of said corporation and said business; that she thereafter paid to the said corporation further sums of money in amounts and on dates unknown to the defendants, at the rate of twenty cents per month for each ticket or certificate, until the redemption of certain certificates, and until receivers were appointed for said corporation and the business wound up by said receivers. That other like tickets or certificates were purchased by other persons from the said corporation, and that various sums of money were by them paid, from time to time, to the said corporation on account of these tickets or certificates, and that the money so paid by the plaintiff and other persons, to the said corporation on account of said tickets or certificates or debentures, was divided and apportioned among other members and holders of certificates which were selected and eligible for redemption.

The answer then states the method by which the debentures selected for redemption were determined and that the selection of these tickets or debentures for redemption was necessarily dependent upon uncertain and indeterminate events; that plaintiff had full knowledge of each and all of these facts and of the manner in which the business was conducted; that the plaintiff as a holder of said certificates or debentures had a direct interest in said business conducted by the said corporation, and in the profits derived therefrom, and in the several sums of money paid by other holders of certificates to the said corporation for the pur-

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chase of said certificates; that the plaintiff was a member of the said company, and owner of an interest therein for a long time and down to the time of the receivership, and winding up of the corporation, and was a direct participant in, and part owner of, the said business, and of the funds accumulated by the said company in the conduct of its business.

The demurrer raises the question, Do these statements, if established by proof, constitute a defense to the cause of action stated in the petition? The statute in question, Rev. Stat. 4271 (Lan. 7047), and under the provisions of which the plaintiff claims a right to recover in this action reads as follows:

"A person who expends any money or thing of value, or incurs any obligation for the purchase of, or to procure, any lottery or policy ticket, hazard, or chance, or any interest therein, in or on account of any lottery, policy, or scheme of chance, or in or on account of any game of faro, pool, or combination, keno, or scheme of gambling, and any person dependent in any degree for support upon, or entitled to the earnings of, such person, and any citizen for the use of the person so interested, may sue for and recover, from the person receiving such money, thing of value, or obligation, the amount thereof, together with exemplary damages, which in no case shall be less than fifty nor more than five hundred dollars, and may join as defendants in such suit all persons having any interest, direct or contingent, in such lottery, policy, or scheme of chance, or the possible profits thereof, as backers, vendors, owners, or otherwise."

The defendants under this defense seek to establish, as a fact, that the plaintiff was herself directly interested as a part owner and sharer in the profits of this lottery scheme, and that as such part owner and sharer in the profits she is not entitled to maintain an action to recover from others jointly interested with her in the illegal enterprise.

That the scheme here disclosed is a lottery is admitted by both sides, and the question has been definitely settled by the decision of the Supreme Court in the case of *State v. Investment Co.* 64 Ohio St. 283 [60 N. E. Rep. 220; 52 L. R. A. 530; 83 Am. St. Rep. 754].

The language of the statute is:

"A person who accepts any money * * * or incurs any obligation for the purchase of, or to procure, any lottery or policy ticket, hazard, or chance, or any interest therein * * * may sue for and recover, from the person receiving such money * * * the amount thereof, etc."

Now, the person receiving plaintiff's money, the demurrer admits, was the corporation known as the Ohio Debenture Company, an artificial person, and that the plaintiff was a part owner by virtue of her ownership of these certificates of the corporation and its business. The busi-

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ness being conducted by this corporation was a business contrary to public policy and the statute law of this state. It was an illegal business, both at common law and under the statute, and as such all persons concerned in such business were *participes criminis* and *in pari delicto*, for the law does not undertake to determine the relative degree of obliquity of those who are concerned in such illegal transactions. That being true, neither at common law nor under that statute law of this state would the courts lend their aid to any of the participants. If the plaintiff has any right of action it must be by reason of the statutory provision and that statutory provision being in contravention of the common law must be strictly construed. Upon this point Judge Scott says, in the case of *Hooker v. DePalos*, 28 Ohio St. 251, 261:

"Such statutes are a recognition of the established rule, that no recovery could be had in such cases at common law; they are exceptional in their character; are in derogation of the common law; and therefore are to be construed strictly, and not extended by implication beyond the particular cases of illegality for which they provide."

The language of the statute is, that such action may be brought against the person receiving money, which in this case was the corporation. It may well be questioned whether, strictly construing the statute, as we must, such action could be maintained against any other person than the corporation with those who may be backers, vendors or sharers in the profits. But passing that, does this statute contemplate or provide for an action by one interested as a part owner in an illegal enterprise, and a sharer in the profits thereof?

After a careful consideration of the question, I have reached the conclusion that the statute will not authorize an action to be brought by one thus situated. It seems to me the plain intent and purpose of the statute is to punish the owners of the lottery scheme and thus to discourage such enterprises. That the statute was intended to permit and does permit an action to be brought against such owners by one who, without having any pecuniary interest in the profits of the lottery, scheme or system itself, has purchased a ticket or chance to obtain a prize under the lottery scheme. That it was not the legislature's intention to give this right to one who had a direct interest in the profits of the illegal enterprise seems to me to be apparent from the provision of the statute itself, that all persons having any interest direct or contingent in such lottery, policy or scheme of chance or the possible profits thereof as backers, vendors, owners or otherwise, may be joined as defendants.

By this provision I think the legislature plainly indicated that it was not intended to give such rights to anyone of that class of persons thus authorized to be made parties defendant. The statute with its penalties is aimed at them, and not provided for their benefit. All that

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class is to be mulcted—not aided by the statute. I think it was the legislative intention to give such right to the players or purchasers of tickets or chances, but not to provide a right of action by one owner against co-owners. I do not believe it was in legislative contemplation that the courts should sit to hear and determine questions of contribution between those generally interested as owners and sharers in the profits of such illegal enterprises. I am, therefore, of the opinion that the averments of the second cause of action, if proven, will constitute a defense and the demurrer is overruled.

The third defense, in substance, states that upon the winding up of the business of the Ohio Debenture Company, and the distribution of the assets of the company to the several claimants and creditors of the said corporation, the plaintiff proved her claim and received as the amount due to her by virtue of her interest in the said corporation the sum of \$272.40, and that her said claim was approved, and that she received that sum of money on account of said debentures which were sold, and issued to her by the said corporation, and upon which profits in the business in the form of dividends had been paid by said corporation to plaintiff, and that said claim was approved, allowed and received by plaintiff, and that it was the same claim that plaintiff is not asserting in this action.

I think this would, if proven, be a defense *pro tanto* at least, and it also states the further defensive fact alleged in the first defense of her sharing in the profits of the business and being a part owner thereof.

The fourth defense is, in substance, a plea of the statute of limitations, the defendants averring that the cause of action stated in the petition did not accrue to the plaintiff within one year before the bringing of this action as to all money expended by her in such debentures, prior to January 11, 1901.

The demurrer raises the question as to whether or not the cause of action is barred within one year under Rev. Stat. 4983 (Lan. 8498) or in six years under Rev. Stat. 4981 (Lan. 8496). After a careful consideration of the decision of the Supreme Court in the case of *Cooper v. Rowley*, 29 Ohio St. 547, I think it is decisive of the question here presented and that the one year statute of limitations applies to actions under Rev. Stat. 4271 (Lan. 7047), as well as to the sections the court was construing in that case. It was the loser who sued in both cases. The court in that case held that it was an action upon a statute for a penalty or forfeiture. Judge Boynton says that this provision includes actions of debt *qui tam*, but does not say that it is limited strictly to what were known as *qui tam* actions at common law, and he observes that,

“Although the plaintiff sues for himself alone, and not for himself

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and another, the result to the defendant—the loss or forfeiture of the sum or thing won—is precisely the same. The fact that the statute confers the right to sue for and recover the whole sum lost by the wager, and awards that sum instead of a moiety or part thereof, to the party suing, does not affect the penal character of the action.”

Nor do I see how there could be any difference in the nature of the action whether brought by a loser within the period of six months during which he has the exclusive right to bring it or brought after that period, when others are also given a right. He has no right to maintain such action except by virtue of the statute. But I am unable to see any difference in the nature of his right if he begins before the expiration of the six months or after. Whenever he brings it within a year, if he be the first to bring such action, he obtains the right to recover the amount lost. “He is permitted to sue,” says Judge Boynton, “not from having any legal claim to the funds in virtue of once owning it, but because he is included in the comprehensive class authorized to maintain the action.”

That language is certainly as applicable to him before the expiration of the six months as afterwards. I believe the statutory limitation of one year applies to actions under this Rev. Stat. 4271 (Lan. 7047) as well as under Rev. Stat. 4270, 4273 (Lan. 7046, 7049). For that reason the demurrer is overruled.

The same rulings apply in the case of *Altfelix v. Halliday et al.*, No. 43,368; *Trogus v. Halliday et al.*, No. 43,246; *Clelland v. Halliday et al.*, No. 43,300 and *Walker v. Halliday et al.*, No. 43,883.

DIVORCE AND ALIMONY—PARENT AND CHILD.

[Superior Court of Cincinnati, General Term, April 24, 1906.]

Hosea, Hoffheimer and Swing, JJ.

(Judge Swing of the Hamilton Common Pleas, sitting in place of Judge Ferris.)

COLUMBUS L. CLARK v. GEORGIANA CLARK.

HUSBAND LIABLE FOR SUPPORT OF MINOR CHILDREN LIVING WITH WIFE DURING SEPARATION THOUGH HE AFTERWARD OBTAIN DIVORCE IN ANOTHER STATE.

Where a husband and wife separate and the wife expends money for the support of minor children for a period of years until they become self-supporting, and the husband afterwards obtains a divorce in another state, the decree naming no cause and not providing for alimony or the support of the children, the husband is liable to the wife for money expended for the support of the children prior to the divorce decree and up to the time when the children become self-supporting. His obligation to support the children cannot be impaired by their mere dissension and living apart.

[Syllabus approved by the court.]

ERROR to special term.

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E. M. Ballard, for plaintiff in error:

The only circumstances under which the mother can recover from the father the money which she has expended in rearing their child is when she has received a divorce from him because of his aggression, and the custody of the child has been given to her because of the father's misconduct. *Finch v. Finch*, 22 Conn. 411; *Fittler v. Fittler*, 33 Pa. St. 50; *Husband v. Husband*, 67 Ind. 583 [33 Am. Rep. 107]; *Brown v. Smith*, 19 R. I. 319 [33 Atl. Rep. 466; 30 L. R. A. 680]; *Johnson v. Onsted*, 74 Mich. 437 [42 N. W. Rep. 62]; *Brow v. Brightman*, 136 Mass. 187; 2 Kent's Commentaries 192; *Harris v. Harris*, 5 Kan. 46; *Glynn v. Glynn*, 94 Me. 465 [48 Atl. Rep. 105]; *Hampton v. Allee*, 56 Kan. 461 [43 Pac. Rep. 779]; *McKay v. McKay*, 125 Cal. 65 [57 Pac. Rep. 677]; *Pawling v. Willson*, 13 Johns. 192; *Hancock v. Merrick*, 64 Mass. (10 Cush.) 41; *Gordon v. Potter*, 17 Vt. 348; *Seaborn v. Maddy*, 38 Eng. C. L. 194; *Fulton v. Fulton*, 52 Ohio St. 229 [39 N. E. Rep. 729; 29 L. R. A. 678; 49 Am. St. Rep. 720]; *Pretzinger v. Pretzinger*, 45 Ohio St. 452 [15 N. E. Rep. 471; 4 Am. St. Rep. 542]; *Foss v. Hartwell*, 168 Mass. 66 [46 N. E. Rep. 411; 60 Am. St. Rep. 366; 37 L. R. A. 589].

There should at least exist facts upon which a court might base a decree for divorce and take the custody of the child away from the father for misconduct. *Pretzinger v. Pretzinger*, 45 Ohio St. 452 [15 N. E. Rep. 471; 4 Am. St. Rep. 542]; *Fulton v. Fulton*, 52 Ohio St. 229 [39 N. E. Rep. 729; 29 L. R. A. 678; 49 Am. St. Rep. 720]; *Eshbach v. Eshbach*, 23 Pa. St. 343.

Under no circumstances could the mother recover for money expended prior to the time of her divorce. *Holt v. Holt*, 42 Ark. 495; *Pretzinger v. Pretzinger*, 45 Ohio St. 452 [15 N. E. Rep. 471; 4 Am. St. Rep. 542]; *Morgan v. Wakelin*, 46 Bull. 117; *Husband v. Husband*, 67 Ind. 583 [33 Am. Rep. 107].

Bates & Meyer, for defendant in error:

The father is liable to any third persons furnishing necessities to his child living with the mother apart from him either:

Where the separation was voluntary: *McMillen v. Lee*, 78 Ill. 443; *Shields v. O'Reilly*, 68 Conn. 256 [36 Atl. Rep. 49]; *Walker v. Loughton*, 31 N. H. 111; *Gill v. Read*, 5 R. I. 343 [73 Am. Dec. 73]; *Grunhut v. Rosenstein*, 7 Daly 164; *Quigley v. Murphy*, 5 Dec. 680 (4 N. P. 1).

Or if she leaves him for a good cause. *Shields v. O'Reilly*, 68 Conn. 256 [36 Atl. Rep. 49]; *Reynolds v. Sweetser*, 81 Mass. (15 Gray) 78; *Hyde v. Leisenring*, 107 Mich. 490 [65 N. W. Rep. 536]; *Walker v. Loughton*, 31 N. H. 111; *Bazelay v. Forder*, L. R. 3 Q. B. 558.

Wife has the same rights of reimbursement for necessities furnished that any third person could have had under the above authorities.

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and it seems to us that *Pretzinger v. Pretzinger*, 45 Ohio St. 452 [15 N. E. Rep. 471; 4 Am. St. Rep. 542], means this. *Morgan v. Wakelin*, 46 Bull. 117; *Clark v. Clark*, 21 Ky. Law. 955 [53 S. W. Rep. 644].

HOSEA, J.

The action below was twice tried—the first trial resulting in a disagreement of the jury, and the second in a verdict for plaintiff below, upon which judgment was entered; and the present proceedings are to reverse said judgment for errors alleged.

The facts, in brief, as appear from the record, are these:

The parties were married in 1879 and after the birth of three children, to wit, in 1884, they became separated and thereafter lived apart. The testimony was conflicting as to whose initiative was the cause of separation, but the verdict may be said to imply the husband's fault in this regard; and there is no charge of error as to the action of the jury upon the weight of evidence. Nor do we, upon a careful reading of the record, perceive any error of the court in giving or refusing to give the special charges asked, nor in the general charge; nor in other actions of the court as to which errors are charged.

The principal contest in the argument here arises upon divorce proceedings resulting in a decree of divorce granted by the Kentucky courts upon the petition of the husband. It is claimed that this is for the "aggression" of the wife and that in consequence she cannot recover under the Ohio rule, which is claimed in substance to be, that the only circumstances under which the mother can recover from the father money expended in rearing a child, is when she is divorced for his aggression and the custody of the child is awarded to her. The cases of *Pretzinger v. Pretzinger*, 45 Ohio St. 452 [15 N. E. Rep. 471; 4 Am. St. Rep. 542], and *Fulton v. Fulton*, 52 Ohio St. 229 [39 N. E. Rep. 729; 29 L. R. A. 678; 49 Am. St. Rep. 720], are cited in support of this contention. But these authorities apply to relations existing after divorce and not before.

The syllabus of the *Pretzinger* case shows its inapplicability to the case in hand, viz.:

"The obligation of the father to provide reasonably for the support of his minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo*, on account of the husband's misconduct, gives her the custody, care and nurture of the child," etc.

In the case at bar the parties separated in 1884; and, whatever the cause, it is clear from the testimony that the husband made no definite effort to provide a home for his family, nor did he offer to relieve the mother of the burden of nurturing and educating the younger children who remained with her. The boy in question (*Stewart*), who was a

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baby in 1884, began earning wages in 1899 at the age of fourteen and a half years. In January, 1900, the divorce was granted on the husband's petition under a law of Kentucky making a separation of five years a sufficient cause. The decree assigns no cause and makes no provision for alimony or for the children. Under such circumstances "aggression" cannot be inferred as a matter affecting the rights of children. But be that as it may, prior to 1900 there was a period of about fifteen years during which the husband contributed nothing to the support of either his wife or the child. The amount awarded by the jury averages about \$2.60 a week for the period of the child's life prior to the earning of wages and prior to the divorce of the parents.

Fulton v. Fulton, *supra*, presents an application of the same principle adopted in *Pretzinger v. Pretzinger*, *supra*. Both cases rest upon the relations of parents to children after a divorce, and have no application to relations preceding that event.

The obligation of the husband to support his family while the marriage subsists is inherent in that relation. The dissensions of parents do not release the obligation of the father to his children, although the helpless dependence of a child may require the mother's custody rather than that of the father when parents live apart. If he choose to accept the continuance of such a condition as years go by and makes no effort to assert his more direct responsibility, he may waive the right to the comfort of the society of the child and still be liable for support so long as the necessity therefor exists.

We find no error in the present case and the judgment must be affirmed.

Hoffheimer and Swing, JJ., concur.

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EMBEZZLEMENT.

[Defiance Common Pleas, June 25, 1906.]

STATE OF OHIO v. WALTER R. FABIN.

EMBEZZLEMENT BY RECEIVERS AND SPECIAL MASTERS COMMISSIONERS NOT PUNISHABLE UNDER OUR STATUTES.

The word "officer" as used in the first paragraph of the statute relating to embezzlement, Rev. Stat. 6842 (Lan. 10449), refers only to officers of corporations and joint stock companies, and the clause in the second paragraph of the same statute, viz., "An officer elected or appointed to an office of public trust, and an agent, clerk, servant, or employe of such officer," cannot be extended to include receivers and special masters commissioners appointed by the court. Our criminal law is not broad enough to embrace embezzlement by such creatures of the courts.

[Syllabus approved by the court.]

DEMURRER to indictment.

D. F. Openlander, prosecuting attorney, and Winn & Hay, for plaintiff.

Marshall & Fraser, for defendant.

Strict construction of criminal statutes. *State v. Meyers*, 56 Ohio St. 340 [47 N. E. Rep. 138]; *United States v. Wiltberger*, 18 U. S. (5 Wheat.) 76 [5 L. Ed. 37].

There are no common law crimes in Ohio. *Mitchell v. State*, 42 Ohio St. 383; *Smith v. State*, 12 Ohio St. 466 [80 Am. Dec. 355]; *State v. Fertilizer Co.* 24 Ohio St. 611.

The word "officer" in Sec. 6842 is qualified by the phrase "of a person" and has reference to officers of corporations and joint stock companies. *State v. Whetstone*, 8 Dec. 260 (7 N. P. 631); *State v. Kusnick*, 45 Ohio St. 535 [15 N. E. Rep. 481; 4 Am. St. Rep. 564]; *State v. Meyers*, 56 Ohio St. 340 [47 N. E. Rep. 138].

A receiver is not the officer or agent of any "person." If an officer at all, he is an officer of the court. *State v. Hubbard*, 58 Kan. 797 [51 Pac. Rep. 290; 39 L. R. A. 860]; *Lottimer v. Lord*, 4 E. D. Smith 183; *United States v. Church of Jesus Christ*, 6 Utah 9 [21 Pac. Rep. 506]; *Farmers' Loan & Tr. Co. v. Railway*, 31 Ore. 237 [48 Pac. Rep. 706; 38 L. R. A. 424; 65 Am. St. Rep. 822]; *Alderman, Receivers* 50, 274, 368, 386.

A court is not a "person" and does not come within the word as defined in 11 Cyc. 652.

An assignee in insolvency, or a trustee is as much an officer as a receiver. *State v. Mannix*, 9 Dec. Re. 667 (16 Bull. 212).

KILLITS, J.

Two cases with the above title are before us for consideration on demurrer to the several indictments. The indictments cover the same

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ground and attempt to charge the same crime, the latter having been returned in an attempt to correct the former. The ground of the demurrers is, that the statutes of this state, defining the crime of embezzlement, do not include in their descriptions of persons subject to prosecution officers of the court,—such as masters commissioners and receivers.

The defendant was indicted in four counts, the first charging that at the time of the commission of the alleged offense he was “an officer, to wit, a special master commissioner,” appointed by this court in a certain action then pending herein, describing it, and, after negating the exceptions found in Rev. Stat. 6842 (Lan. 10449), that by virtue of his said office and employment, and while discharging the duties thereof, received and took into his possession certain money belonging to, and which should have been distributed to, the certain persons named in the indictment, which he fraudulently and unlawfully embezzled and converted to his own use. The second count is identical with the first, save that the defendant is therein described as “an officer, to wit, a receiver appointed, etc.” The third and fourth counts follow the first and second in all essentials, save that the amount alleged to have been embezzled is another sum, belonging to, and to have been distributed to, a different person.

It is evident that an attempt has been made to plead an offense under Rev. Stat. 6842 (Lan. 10449), which, so far as pertinent to the cases under consideration, and at the date of the alleged offense, read as follows:

“An officer, attorney at law, agent, clerk, guardian, executor, administrator, trustee, assignee in insolvency, * * * servant or employe of any person, except apprentices * * * who embezzles * * * and any officer, elected or appointed to an office of public trust or profit in this state, and an agent, clerk, servant or employe of such officer * * * who embezzles, * * * is guilty of embezzlement.”

Apparently, the pleader conceived the defendant, as receiver or master commissioner, to be an “officer” as that term is first used in the statute; the demurrer challenges the proposition that defendant, in such capacity, came within any of the foregoing descriptions of persons capable of embezzling, and our decision must turn on the construction of this statute, and particularly of the words describing persons liable. At the outset we are met with the rule of strict construction. No person may be made subject to a criminal statute by implication, however his offense may appear to be within its reason. Only such transactions or persons are included in a criminal statute which are within both the spirit and the letter of the law, and all doubts of in-

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terpretation must be resolved in favor of the accused. *Andrew v. United States*, 2 Story 202 [1 Fed. Cas. 904]; *Hall v. State*, 20 Ohio 7; *State v. Meyers*, 56 Ohio St. 340 [47 N. E. Rep. 138].

As a necessary corollary to this rule, it is settled that there are no common-law crimes in this state, and no act, however hurtful or immoral, is punishable as a crime in Ohio, unless the same is specifically embraced within the terms of some statute. *Sutcliff v. State*, 18 Ohio 469 [51 Am. Dec. 459]; *Mitchell v. State*, 42 Ohio St. 383; *Johnson v. State*, 66 Ohio St. 59 [63 N. E. Rep. 607; 61 L. R. A. 277; 90 Am. St. Rep. 564].

Turning now to the section, and its legislative history, always open for profitable consideration in construing statutes, we find that the first embezzlement statute was passed in 1839, and read as follows:

"That if any clerk or servant of any private person or of any co-partnership, except apprentices and persons within the age of eighteen years, or if any officer, agent, clerk, or servant of any incorporated company shall embezzle, etc." (Swan, 1841, page 239; 37 O. L. 74.)

This law did not have the last clause relating to embezzlements by public officers, their agents and servants, and it will be noticed that the word "officer" is limited exclusively to corporations.

The law was next amended in 1864 (61 O. L. 54) by adding the words "or joint stock company" after the words "incorporated company." In other respects the law was left as it had existed for two decades. In 1869 (66 O. L. 29), it was amended by the insertion of the word "agent" after "clerk" in the first line, and by adding the clause relating to embezzlements by public officers.

In 1877 the criminal statutes of Ohio were revised (74 O. L. 240) under this title: "An act to amend, revise and consolidate the statutes relating to crimes and offenses, and to repeal certain acts therein named; to be known as title one, crimes and offenses, part four, of the act to revise and consolidate the general statutes of Ohio." The first section of this act provided that the words "person" and "another," when used to designate the owner of any property the subject of an offense, should be held to include "not only natural persons, but every other owner of property." See Rev. Stat. 6794 (Lan. 10387). This provision made possible a consolidation of several embezzlement statutes, and accordingly, a comprehensive law appears, 74 O. L. 249, as follows:

"An officer, agent, clerk, servant, or employe of any person (except apprentices, and persons under the age of eighteen years), who embezzles, * * * and an officer elected or appointed [to] an office of public trust or profit in this state, and an agent, clerk, servant, or employe of such officer, or of a board of such officers, who embezzles, etc."

This revision and consolidation is seen to have consisted in re-

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arranging and cutting down the number of words in the first part of the old main statute, made possible by the enlarged use of the term "person," and, by adding the words "and an agent, clerk, servant or employe of such officer, or of a board of such officers," in doing away altogether with several long sections relating to embezzlements by appointees in the public institutions.

It is a mandate of construction of all revised statutes, and particularly those embraced in the revision provided for by the act of 1875 (72 O. L. 87), of which this embezzlement statute, as re-enacted in 1877, is one, that the same construction which the original statute received, or would have received had its interpretation been called for, should be applied to its enactment in its revised and consolidated form, although the language may have been changed, unless it is clear that by changed language a change of substance was intended. *Allen v. Russel*, 39 Ohio St. 336, 337.

Applying this principle, it is plain that as to the first use of the word "officer" in the revised statute, there is no enlargement of the revised statute over the original, and that only the "officer" of a person, i. e., an artificial person, such as can become and is the owner of property (Rev. Stat. 6794; Lan. 10387) is within its provisions. It is apparent, that applying this rule, and considering the elements out of which the revised statute was created, that the word "person" cannot include the court; that where it is seen, from the facts of the case, not to mean a natural person, its application is limited to incorporated or joint stock companies.

Judge Thurman, in *Bloom v. Richards*, 2 Ohio St. 387, 400, says, "The law is presumed to use words in their ordinary signification, unless a contrary intention is apparent," and that principle rigidly applies in interpreting a criminal statute, where strictness is required. It would be nonsense to say that the court is a natural "person," and it would violate the rule above-mentioned to say that a court is one of the artificial persons embraced in the use of this word here, not only because what were embraced within the provisions of the old statutes were clearly defined, but because of the fact that the first section of the criminal revision act (74 O. L. 241; Rev. Stat. 6794; Lan. 10387) limits the application of the word to such artificial persons as are the owners of property.

The court appointing Fabin receiver or master commissioner was the owner of the money he is charged with embezzling neither as a general proposition, because of the nature of the court's relation to the matters with which it deals, nor as a fact as a private individual.

Our conclusion, therefore, as to the first part of the law, in force at the time of Fabin's alleged offenses, is, that he was not then an

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officer as the term is there used, and that, assuming that the pleader conceived his facts to lie within that part of the statute, he was in error.

That this portion of the law has been recognized by the legislature to be too narrow in its application to meet all cases of embezzlements by persons occupying fiduciary relations touching private interests is seen in the course of legislation since 1877. In 1881 (78 O. L. 186), the words "attorney at law, guardian, executor, administrator," were added; in 1885 (82 O. L. 140), the words "assignee in insolvency" were added, and a recapitulation of all the capacities in which things of value might come into the possession of the embezzler to be within the statute was had; in 1886, bringing the statute down to the form in which it was at the time of the commission of Fabin's alleged offenses (83 O. L. 23), the word "trustee" was added; finally, in 1902 (95 O. L. 303), it was deemed necessary to make a provision covering fraternities and mutual benefit societies. We believe the court should recognize this feeling of the legislature, that the statute cannot be extended beyond its strict terms.

Can it be said that Fabin came within the description contained in the second paragraph of the statute, "an officer elected or appointed to an office of public trust or profit in this state, and an agent, clerk, servant, or employe of such officer?" But a moment's thought suggests that a receiver or master commissioner may not be called an officer filling a position of public trust or profit. But can he be fairly described as an agent, clerk, servant, or employe of such officer? The answer of this in the negative is imperative after a brief consideration of the status of the court, and of the relation of a receiver thereto. The indictment avers that the defendant was appointed to his position by the court, as distinguished from the judge at chambers. Now, a court cannot be said to be an officer. Webster defines a court, as being "an official assembly, legally met together for the transaction of judicial business," which needs for its lawful gathering a number of individual officers, judge or judges, clerk and ministerial officers, and all definitions exclude the idea that the collective body known as a court is embraced with the term "officer." 11 Cyc. 652.

Nor, if the court might be considered an officer, is a receiver appointed by it, its agent, within the authorities:

"A receiver is an indifferent person between the parties, appointed by the court to receive the rents, issues or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. * * * The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." *Booth v. Clark*, 58 U. S. (17 How.) 322 [15 L. Ed. 164].

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These words do not describe either an agent, clerk, servant or employe, either of whom may bind his superior, by the performance, without special orders, of anything in the scope of his engagement which his master might do, and which are incidental thereto.

Very nearly this exact question, distinguishable only because of a difference in the wording, of the statutes, was before the Supreme Court of Kansas, in *State v. Hubbard*, 58 Kan. 797 [51 Pac. Rep. 290, 291; 39 L. R. A. 860], wherein this language is used:

"The contention of the defendant is, that the relation of agency, as ordinarily understood, does not exist between a receiver and the court which appoints him or the parties for whom he acts. A majority of the court agree with this contention, and are of the opinion that a receiver is not an agent, within the meaning of the statute. It is held that, in construing a criminal statute, words must be given their ordinary meaning, unless it is clear that another was intended, and that to place receivers in a class with agents requires an unusual and strained construction of the statutory language."

Although the statutes under consideration differ, the argument of the Kansas court is equally applicable to the situation before us.

We are of the opinion, therefore, that the criminal laws of this state are not broad enough to embrace embezzlements by receivers or special master commissioners, and that the demurrer to each indictment should be sustained, with exceptions to the state.

BONDS—INJUNCTION.

[Franklin Common Pleas, February 6, 1906.]

ALFRED MACHOLD v. PITTSBURGH, C. C. & ST. L. RY. ET AL.

SUIT MAY BE BROUGHT ON INJUNCTION BOND, WHEN ACTION DISMISSED FOR WANT OF PROSECUTION.

An action on an injunction bond may be maintained when the action in which the temporary injunction has been issued has been later dismissed by the court on account of the failure on the part of the plaintiff to prosecute the same. *Krug v. Bishop*, 44 Ohio St. 221, where the action was dismissed by plaintiff without prejudice, not followed.

[Syllabus approved by the court.]

L. H. Innis, for plaintiff:

Cited and commented on the following authorities: *Mitchell v. Sullivan*, 30 Kan. 231 [1 Pac. Rep. 518]; *Williams v. Ballinger*, 125 Iowa 410 [101 N. W. Rep. 139]; *Shenandoah Nat. Bank v. Read*, 86 Iowa 136 [53 N. W. Rep. 96]; *Swan v. Timmons*, 81 Ind. 243; *Apollinaris Co. v. Venable*, 136 N. Y. 46 [32 N. E. Rep. 555]; *Asevado v. Orr*, 100 Cal. 293 [34 Pac. Rep. 777]; *Weaver v. Poyer*, 73 Ill. 489;

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Pugh v. White, 78 Ky. 210; *Whitehead v. Tulane*, 11 La. Ann. 302; *Yale v. Baum*, 70 Miss. 225 [11 So. Rep. 879]; *Pacific Mail Steamship Co. v. Leuling*, 7 Abb. Pr. (N. S.) 37; *Pacific Mail Steamship Co. v. Toel*, 85 N. Y. 646; *Vanderbilt v. Schreyer*, 28 Hun 61; *Parker v. Telegram Co.* 3 N. Y. 174; *Amberg v. Kramer*, 56 Hun 640 [8 N. Y. Supp. 821]; *Wynkoop v. Van Beuren*, 63 Hun 500 [18 N. Y. Supp. 557]; *Manning v. Cassidy*, 80 Hun 127 [30 N. Y. Supp. 23]; *Kane v. Casgrain*, 69 Wis. 430 [34 N. W. Rep. 241]; *Krug v. Bishop*, 44 Ohio St. 221 [6 N. E. Rep. 252].

Henderson, Burr & Livesay, for defendant.

DILLON, J.

The petition alleges that in a former action in this court the defendant railway company, in an action against the plaintiff, secured a temporary injunction against him and gave a bond with its codefendant as security, which bond in accordance with Rev. Stat. 5575 (Lan. 9108), secured to the plaintiff there enjoined, the damages he might sustain "if it be finally decided that the injunction ought not to have been granted."

The petition further alleges that about four years subsequently to the filing of the petition in the case, the injunction was dismissed for want of prosecution. Damages are asked in the sum of \$1,000 alleged to have been incurred by reason of the granting of said temporary injunction.

A demurrer is interposed by the defendants, and the claim is made in support thereof that it has not yet been finally decided that the temporary injunction ought not to have granted and that no recovery can be had upon such a bond unless there has been a decision by the court on the merits of the case in which the action was pending. While the statutes and the wording of the required bond are practically the same in all the states, there is some conflict as to just what action of the court is necessary in order to warrant the conclusion that it has not been "finally decided" that the injunction ought not to have been granted.

It seems well settled that where the action is subsequently dismissed by any agreement or consent of the parties, whether by compromise or otherwise, no action will lie upon the bond because the court has not, in such case by any decision of its own, decided that the injunction ought not to have been granted. *Columbus, H. V. & T. Ry. v. Burke*, 54 Ohio St. 98 [43 N. E. Rep. 282; 32 L. R. A. 329].

In this last-named case the parties agreed to abide by the decision of arbitrators after the action had been commenced, and the court applying the rule that the terms of such a bond must be strictly construed, held that the decision contemplated by the plaintiff was a decision by the court on the merits of the case in which the action was pending; that the parties had bound themselves to stand to and abide the award whether right or wrong, of their own deliberate purpose, and therefore

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no such step such as error or appeal could be permitted nor such other steps as the law requires in order that the decision may conform to the law. It has likewise been held in the state of New York that where an action is dismissed as a penalty upon the plaintiff for contempt of court, this does not involve the merits of the case and will not warrant an action upon the bond, the decision of the court in such case being purely punitive and having no reference to the merits of the case or to the plaintiff's willingness to proceed with the trial of the same. *Apollinaris Co. v. Venable*, 136 N. Y. 46 [32 N. E. Rep. 555].

In that case the court says that the dismissal of the action and the consequent dissolution of the injunction was upon a matter having no relation to the merits, either directly or by inference, and it would, therefore, be contrary to the natural or reasonable interpretation of such action to hold that this dismissal was a determination by the court that the plaintiff at the time the temporary injunction was issued, was not entitled thereto, and that such a holding would be contrary to the undertaking of the sureties.

The contention of the defendant in this case, that there must be an actual decision upon the merits, I do not think is sustained by the reasoning or authorities. A temporary restraining order is granted without a full hearing and often without any hearing at all. The court relies upon the urgency of the situation as represented by the plaintiff. To assure the court and the parties affected, that the plaintiff is right and that no injustice may result by reason of the exercise of this most unusual and potent remedy, the plaintiff gives this bond to answer for any damages which the defendant may suffer, the condition of the bond being that such damages will be paid to the defendant in case the court shall finally decide that said injunction ought not to have been granted. The only inquiry remaining is as to whether or not there is such a judgment rendered by the court as amounts to a judicial finding that the injunction ought not to have been granted.

Of course, the final order of the court in such cases is rarely if ever made in the exact language above quoted. Indeed, the final order seldom refers to the existence of the preliminary order but is simply a finding for or against the plaintiff. It is, therefore, by virtue and force of natural and logical deduction, that the conclusion is reached that the judicial finding in effect was, that the injunction ought not to have been granted.

In the case of *Pugh v. White*, 78 Ky. 210, the plaintiff's petition, after injunction obtained, remained in court some five years when the action was dismissed for failure to prosecute. The court held that this dismissal of the petition was a judicial determination that the injunction ought not to have been granted. The authorities, in discussion of the subject, receives very thorough treatment in this case.

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The case of *Mitchell v. Sullivan*, 30 Kan. 231 [1 Pac. Rep. 518], holds directly that where the plaintiff subsequently appears in court and dismisses his action without prejudice to another action, such judgment is equivalent to a final decision by the court that the temporary injunction ought not to have been granted, and that an action lies upon the bond immediately by reason thereof. The argument of the court in that case is most potent. Any other conclusion would lead to the greatest of mischiefs and manifestly be contrary to the plain meaning, object and purpose of the bond itself. The suggestion at once occurs that if a party might by temporary injunction be restrained and held *in statu quo*, during the entire period the case is awaiting trial, to his great damage and injury, and then the same could be dismissed by the plaintiff on his own motion, what great injustice would be done. The defendant asks no relief; he cannot prevent the plaintiff (after the expiration of sufficient time to enable plaintiff to accomplish his purposes), from voluntarily dismissing his action either with or without prejudice. The defendant in such case would have been put to great trouble, inconvenience, damage and expense and yet have no remedy. Despite the force of this argument, however, we are met in our own state by the case of *Krug v. Bishop*, 44 Ohio St. 221 [6 N. E. Rep. 252], in which it was held that where such an action is dismissed without prejudice, no breach of the condition of the undertaking occurs. The court makes prominent by the use of italics that the action was dismissed without prejudice.

The case at bar may, therefore, be distinguished from the last-named case by the fact that the action in question here was not so dismissed.

Opposed to this decision in Ohio is not only the recent arguments set forth in the Kansas case, but directly opposed upon the same state of facts is the case of *Swan v. Timmons*, 81 Ind. 243, and the case of *Weaver v. Poyer*, 73 Ill. 417. In the last two named cases, the plaintiff voluntarily dismissed his case without prejudice and a new action was pending in which an injunction had been granted, but the court held that the right to a recovery on the bond accrued *instantly* upon the dismissal of the first case. The failure of plaintiff, therefore, to prosecute is in law a confession by him that he has no case to try, and that his action in interfering with the rights of the defendant by injunction was without right, and it matters not whether this dismissal be at the request of the plaintiff or by the neglect of the plaintiff.

The law requires and demands that the plaintiff who thus secures a temporary injunction against the defendant shall, in the absence of settlement, make good his implied promise to the court, that he has a cause of action and that he is right in obtaining from the court this powerful remedy in advance of a hearing in which the defendant has not had his day. The demurrer to the petition will, therefore, be overruled.

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EXEMPTIONS.

[Franklin Common Pleas, April 17, 1906.]

LYNCH V. RODEBAUGH.

PORTION OF WAGES PAID BY DEBTOR TO WIFE TO PAY OFF MORTGAGE ON HOME PROPERTY RENDERS SUCH PROPERTY INsofar EXEMPT.

Where a husband purchases a lot with his own money and takes title there-to in his wife's name and erects a house thereon, giving a mortgage on the premises to cover the cost of same, and using the same when erected as a home for himself and family, his payments of \$15 per month to his wife out of his wages to pay off this mortgage debt render this property insofar exempt from execution on a judgment rendered against him. To the extent of the payments made before the house was built and while defendant and his family were residing elsewhere, the property in question will be held to be that of husband and subject to the payment of his debts.

[Syllabus approved by the court.]

T. J. Duncan and Perry & Roach, for plaintiff:

Fraudulent conveyances. *Rogers v. McCauley*, 22 Minn. 384; *Bills v. Bills*, 41 Ohio St. 206; *Roig v. Schults*, 42 Ohio St. 165; *Fry v. Smith*, 61 Ohio St. 276 [55 N. E. Rep. 826]; *Sears v. Hanks*, 14 Ohio St. 298 [84 Am. Dec. 378]; *McComb v. Thompson*, 42 Ohio St. 139; *Schuler v. Miller*, 45 Ohio St. 325 [13 N. E. Rep. 275]; *Wetz v. Beard*, 12 Ohio St. 431; *Stump v. Frary*, 6 Circ. Dec. 357 (13 R. 619); *Carpenter v. Warner*, 38 Ohio St. 416; *Dickinson v. Johnson*, 22 Ky. Law 1686 [61 S. W. Rep. 267; 54 L. R. A. 566]; *Robb v. Brewer*, 60 Iowa 539 [15 N. W. Rep. 420]; *McCoy v. Cornell*, 40 Iowa 457; *Anderson v. Cook*, 105 Ga. 496 [30 S. E. Rep. 884]; *Seligmann v. Clothing Co.* 69 Wis. 410 [34 N. W. Rep. 232]; *Bell v. Livestock Co.* 11 S. W. Rep. 344; *Davidson v. Chair Co.* 41 S. W. Rep. 824 (Tex.); *Bloodgood v. Meissner*, 84 Wis. 452 [54 N. W. Rep. 772]; *Morse v. Towns*, 45 N. H. 185; *Manchester v. Burns*, 45 N. H. 482; *Wooster v. Page*, 54 N. H. 125 [20 Am. Rep. 128].

Henderson, Livesay & Burr, for defendant.

BIGGER, J.

The plaintiff in her petition states that she obtained a judgment for \$152 before a justice of the peace against the defendant, Clinton C. Rodebaugh, and that thereafter she filed a transcript of said judgment in the office of the clerk of this court, and caused an execution to issue thereon, which was, for want of goods and chattels whereon to levy, levied on the real estate described in the petition, which real estate stands in the name of Zetta Rodebaugh, the wife of the defendant, and it is alleged that this property was purchased by the defendant, but that the title to the same was placed in the name of the wife for the purpose of hindering, delaying and defrauding the creditors of the defendant. The answer is a general denial.

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The case was tried to the court at last term. The case turns really upon a single legal question which arises upon the evidence. The testimony shows that the lot was purchased and title taken in the wife's name. Both husband and wife testified that about the sum of \$100 of the purchase price of \$350 was paid from money belonging to the wife. About \$100 more was paid, so they state, by the husband out of his wages, he paying the sum of \$10 per month until that amount was paid, when a deed was executed to the wife for the lot and a mortgage given to secure the balance of the purchase price of \$150. This mortgage was made subsequent to a loan obtained from a building and loan company which was used to build the house on the lot which was afterwards used by the husband and wife as their home. It appears that after this house was built the defendant paid out of his wages to his wife the sum of \$15 per month which was applied in payment of the mortgages on the property. The legal question arising upon this state of facts is this: Can a debtor give to his wife out of his monthly earnings, which the evidence shows amount to about \$50 to \$60 per month, the sum of \$15 each month, the same being applied in payment of the loan obtained to build a house which they are using as their home and have the property exempt from application to the payment of his debts under the exemption law of this state.

It is claimed that under the exemption law of this state which exempts the earnings of the debtor for a period of three months, when it is made to appear that they are necessary for the support of his family, that the application of such a sum, for the purpose of furnishing a residence to the family of the debtor is permissible under the exemption statute, and that whether it be given to the wife or paid to some third party who will furnish a residence, the said sums being a reasonable allowance for that purpose, are exempt and that the property purchased therewith is also exempt.

This was expressly decided to be the law by the circuit court of Lucas county in the case of *Stump v. Frary*, 6 Circ. Dec. 357 (13 R. 619). Counsel for the plaintiff contend earnestly that this case is wrongly decided and is not controlling upon this question. It is true this court is not bound to follow that decision, but, after a careful examination, I am of opinion that if the facts of this case were the same as in *Stump v. Frary*, *supra*, that it ought to be allowed. I am inclined to the opinion that it is bound in principle as applied to the facts of that case. It has been decided by the courts of last resort in other states, in cases cited by counsel in their briefs, that where the earnings of a debtor are absolutely exempt for a certain period, that they may be applied as he sees fit, and that he may give them to his wife if he chooses or make any other disposition of them which he may see fit. This is true of any other property which is absolutely exempt as well as of the wages, the prin-

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ciple being, that if they are absolutely exempt they cannot be reached by his creditors and if he gives them away during the time that they are so exempt, that the creditors cannot complain, because he had a right to do as he pleased with them, that it was no fraud upon the creditors.

Now, our statute does not exempt the earnings absolutely, but they are just as absolutely exempt under the terms of the statute whenever it is made to appear—for that is the language of the statute—that they are necessary for the support of his family. Now, it would not be seriously questioned that the sum of \$15 per month would be a reasonable allowance for house rent, and creditors certainly could not well complain if the debtor used that amount of his monthly earnings in the payment of house rent. Now, in principle, what difference can it make whether that money be paid to the wife, who out of it furnishes the home for the family, or paid to another person who does the same? If the wages were allowed to accumulate in the hands of the employer for more than three months they would not be exempt after that period, but if \$15 of it was applied each month for house rent would it make any difference to the creditor whether the employer retained \$15 each month to furnish a house to his employe or whether the husband drew it and paid it to his wife for the same purpose? In each case the money is paid out for a necessity, and during the period when it is exempt for the family—to wit, a house to live in.

Now, the title to this property is in the wife. She bought the property according to the evidence and obtained a loan and built the house, and that she is repaying the loan out of the \$15 a month. It is not easy to see upon what principle creditors can complain of this as in fraud of their rights, if it be conceded, and I think it cannot be successfully controverted, that each month the husband might apply the sum of \$15 for house rent as a necessity for his family under the exemption law.

Now, if in exchange for the \$15 paid each month by the husband out of his earnings the wife had furnished a house for the family to live in, then I am of the opinion that the principle announced in *Stump v. Frary, supra*, is correct, but if it goes beyond that it is not sound law. These wages are not exempt except they be necessary for the support of the family, and during the period provided in the statute. Now, I am compelled to reach the conclusion upon the evidence in this case, that to the extent of about \$200 of the purchase price of this property, which was paid before any house was built, with this money and was paid out of the earnings of the husband, that it cannot, under the statute, be said to have been exempt. The parties undertake to claim that about \$100 of this money was the wife's money. But in doing so their story is so improbable, and it is so clearly impeached that I am compelled to discredit their testimony upon that point. They both claim that she had a part of it deposited in the Ohio National Bank, but Mr. Kiesewetter testifies that the wife never had any money in that bank.

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As to the balance of the \$200 paid before the house was built, the husband admits it came out of his earnings, but how can that money be claimed to be exempt under the statute? They must of necessity pay house rent elsewhere during that time if there was no house then built on the lot in which to reside. Certainly a man could not claim the right to have his house rent exempt and also an additional sum by way of an investment in real estate which he expected at some future time to use as a home. House rent as a necessity could be paid but once each month. A man could not claim a right on the plea of necessity to pay rent for two houses at the same time. Now, if in this case the entire sum paid by the husband in monthly payments of \$15 had been paid to the wife, who at all times in exchange therefor had furnished a house for the family to live in, the doctrine of *Stump v. Frary, supra*, would apply. But under the facts of this case I am compelled to reach the conclusion that as to the extent of \$200 of this sum it was not paid in exchange for the furnishing of a house to live in, but as an investment in real estate, in addition to paying house rent, and that it cannot be claimed to be exempt to that extent as against his creditors. As it has been used together with other money which is exempt in paying for this property, the only way that it can be reached is by setting aside the conveyance and subjecting it to the payment of the plaintiff's claim.

For these reasons the finding and decree must be in favor of the plaintiff.

MUNICIPAL CORPORATIONS—INTOXICATING LIQUORS.

[Franklin Common Pleas, May 28, 1906.]

MACK LANDMAN v. COLUMBUS (CITY).

1. ORDINANCE CONTROLLING THE KEEPING OPEN OF SALOONS NOT INVALID BECAUSE EXEMPTION CLAUSE DOES NOT COME WITHIN EXEMPTION OF STATUTE REGULATING SALE OF INTOXICATING LIQUORS.

The ordinance of a city which provides for the closing of saloons at certain hours, a "midnight closing" ordinance, which seeks to regulate saloons and kindred places only, cannot be deemed invalid because an exemption clause therein referring to the filling of prescriptions by druggists does not state such exemption in substance as it is stated in the statute relating to the regulation of the sale of intoxicating liquors. The statute refers to the sale of liquors the ordinance only to the keeping open of saloons and places *sui generis* where liquors are sold.

2. IN AFFIDAVIT CHARGING VIOLATION OF MIDNIGHT CLOSING ORDINANCE NOT NECESSARY TO STATE THAT INTOXICATING LIQUORS WERE SOLD AS A BEVERAGE.

In an affidavit charging one with keeping a saloon open after the time provided in an ordinance for closing, it is not necessary to allege that the purpose was to sell intoxicating liquors as a beverage. The offense is simply in keeping such a place open.

[Syllabus approved by the court.]

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R. S. Swepston, for plaintiff:

Cited and commented on the following authorities: Rev. Stat. 4364-16, 4364-20, 4364-20c, 4364-20j (Lan. 7256, 7259, 7275, 7282); *De Monte v. Pabst*, 14 Dec. 97; *Akerman v. Lima (City)*, 8 Dec. 430 (7 N. P. 92); *Hirn v. State*, 1 Ohio St. 15; *Canton v. Nist*, 9 Ohio St. 439; *Burckholter v. McConnellsville*, 20 Ohio St. 308; *Daggett v. Hudson*, 43 Ohio St. 548 [3 N. E. Rep. 538; 54 Am. Rep. 832]; *Pope v. Cincinnati*, 2 Circ. Dec. 285 (3 R. 497); *Arata v. State*, 12 Dec. 730; *Cheadle v. State*, 4 Ohio St. 477; *New Lexington (Vil.) v. Hughes*, 56 Ohio St. 771 [49 N. E. Rep. 1111].

Marshal, Hoover & Scarlett, for defendant.

DILLON, J.

The only question I consider necessary and proper to discuss in this case is the one challenging the validity of what is commonly called the midnight closing ordinance of the city.

The statute of this state giving to every municipal corporation the power to regulate the sale of intoxicating liquors (Rev. State. 4364-20; Lan. 7259) is still expressly retained in the municipal code. Subdivision 5, Rev. Stat. 1536-100 (Lan. 3102).

There is a qualifying or exempting clause found in Rev. Stat. 4364-20c (Lan. 7275), which restriction thus contained in the act itself provides in substance that regular druggists shall not be prevented from selling intoxicating liquors for certain purposes and on certain conditions, and further providing that in case of sales for medicinal purposes, there must be an accompanying prescription by a regular physician.

The claim is made that the ordinance of the city of Columbus in question, and known as Secs. 319-321, of the codification of 1896, does not make the exemption in as full terms nor in as broad terms as are provided by the statute. The exempting clause in the ordinance provides that,

"Nothing in the provisions of any section of this ordinance shall be construed to prevent regular druggists from filling prescriptions by regular practicing physicians."

The question has been argued in this case that this ordinance, to be valid, must contain the full exemption clause in substance, the same as the statute. Some *Nisi Prius* decisions are cited in which the point has been disposed of. The case of *Edis v. Butler*, 11 Dec. 245 (8 N. P. 183), seems to answer this proposition in the negative, on the ground that an exemption provided for by statute will be read into the ordinance itself, even though no mention of the exemption is made in the ordinance.

The case of *Hirn v. State*, 1 Ohio St. 15, lays down the doctrine that an indictment under a statute must negative the stated acts, and following this decision we have the case of *Akerman v. Lima*, 8 Dec. 430

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(7 N. P. 92), which seems to take the opposite view from that taken in *Edis v. Butler*, *supra*.

The case of *Canton v. Nist*, 9 Ohio St. 439, however, declares such an ordinance void because its excepted provision was narrower than that provided by statute. While the last-named case is not directly in point, it certainly furnishes an indication of the probable necessity of embodying all exceptions provided for by statute in any ordinance which seeks to regulate the same subject-matter. It would seem on principle, that no better reason exists for holding an ordinance valid by reading into it the statutory provisions which it has omitted than to hold a statute valid by reading into it constitutional provisions which it has violated.

The city council in legislating under a statute is limited to the powers expressly conferred by that statute. To render an act of the city council valid by reading into it something that is not there, calls upon the court to exercise functions other than judicial. The court does not know that the ordinance and regulation would have been passed if the council had had before them the exempted features which were requisite to make such an ordinance valid. But it seems to me that the particular ordinance in question does not fairly raise this point.

A reading of the exemption clause of the statute (Rev. Stat. 4364-20c; Lan. 7275) shows that it refers and applies solely to any regulation which council may desire to make of the liquor traffic as carried on by druggists only. Does this ordinance in question apply to druggists? If so, it would probably fail for the reasons above stated, in that it does not contain the exemptions provided for by the statute. But it seems to me that a careful consideration of Sec. 319 of the codified ordinance must satisfy one that the ordinance not only specifically omits and excludes any reference to druggists whatsoever, but on the contrary its constant reference is simply to saloons and places where beer, ale, spirituous or other intoxicating liquors are sold. What places are these? The ordinance itself under the well-settled construction, in referring to other places than saloons, of course means places *sui generis*.

There was no evil or regulation necessary to prevent druggists from remaining open all night, as shown by the act in question. But as to the sale of these same liquors in saloons and like places, the power exists to close them absolutely and thus bring the regulation down to entire prohibition. Moreover, I call counsel's attention to Sec. 8 of the act now digested, Rev. Stat. 4364-16 (Lan. 7256), which specifically provides that the language as used in this ordinance in question shall not mean to apply to sales by druggists. In view of the fact, therefore, that the exemption clause applies only to sales by druggists, and in view of the fact that this ordinance has not attempted to regulate any such sales but only sales by saloons, or kindred places, I hold the ordinance to be valid. The affidavit, therefore, is sufficient to charge the offense alleged.

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Some other matters are urged with reference to errors occurring at the trial, of which I do not consider it necessary to mention any one in particular except the contention that this affidavit, and therefore, the ordinance should allege the sale to have been made to be used as a beverage. It will be noticed that the object of this regulation is not so much to keep people from drinking as it is to keep the houses closed. It is not material, in view of the ordinance, for what purpose the saloon in question was opened for the sale of intoxicating liquors. You must remember that this is the exercise of a police power and for that purpose, if, in the opinion of the city council, it was necessary in order to close saloons that no sales at all shall be permitted after midnight, it is immaterial that they were made for the purpose of being taken as a beverage or for the purpose of being given away to somebody else. No such limitation is placed on municipal legislation by the law. Of course, none can be read into the law by the court.

The judgment of the police court is, therefore, affirmed. Exceptions.

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BILLS, NOTES AND CHECKS—PRINCIPAL AND SURETY.

[Superior Court of Cincinnati, Special Term, January, 1906.]

CONETT, TRUSTEE, v. SQUAIR, ADMX.

1. PAROL EVIDENCE ADMISSIBLE TO REBUT PRESUMPTION CREATED FROM POSITION OF SIGNATURES ON NOTE.

The presumption which arises from the position of signatures on a promissory note may, in an action for contribution, be rebutted by the introduction of parol evidence, and the true relation existing between the signers shown.

2. PRESUMPTION EXISTS THAT SURETIES ON NOTE FOR SAME PARTY ARE CO-SURETIES.

If two parties to a promissory note are in fact sureties for the same obligation and the same party, the presumption will arise that they are co-sureties, and therefore liable to contribution, unless competent evidence is introduced which rebuts the same.

3. PRIMA FACIE PRESUMPTION FROM POSITION OF SIGNATURES ON PROMISSORY NOTE IS OVERTHROWN BY COMPETENT UNREBUTTED TESTIMONY OF DIFFERENT RELATION.

In an action for contribution on a promissory note by one who is *prima facie* a maker thereof, but who alleges that he was in fact a cosurety of defendant whose signature is endorsed on the back, if the plaintiff introduces competent parol evidence to prove such allegations, and no competent evidence is adduced by the defendant to controvert the same, the presumption that plaintiff and defendant were cosureties will be established, and the latter will be liable to contribution.

4. SIGNER OF PROMISSORY NOTE CANNOT RELY UPON PRIMA FACIE RELATION EXISTING BETWEEN OTHER PARTIES.

If a party signs a promissory note without ascertaining the true relation existing between the previous signers, he is not justified, as a matter of law, in relying upon the *prima facie* facts, but becomes a surety for those who are in fact principals thereon and a cosurety with those who are in fact sureties, regardless of the position of their signatures on the instrument.

5. BANKRUPT IS NOT COMPETENT TO TESTIFY IN ACTION ON NEGOTIABLE INSTRUMENT BY HIS TRUSTEE AGAINST DECEDENT SIGNER'S ADMINISTRATOR.

In an action on a negotiable instrument by a trustee in bankruptcy against the administrator of a decedent's estate, the bankrupt is not a competent witness for the plaintiff to show a relation existing between him and the decedent other than that appearing on the face of the instrument; nor does such evidence become competent upon the introduction of testimony of the defendant's intestate taken in a former but different action between the same parties in another tribunal.

N. J. Utter, for plaintiff:

Contribution. The true relation of the original parties may be shown regardless of the form of the note. *Oldham v. Broom*, 28 Ohio St. 41; *Baker v. Kellogg*, 29 Ohio St. 663; *Douglas v. Waddle*, 1 Ohio 413 [13 Am. Dec. 630]; *Brandt*, Suretyship Sec. 260, 261.

Contribution an equitable action and not founded on contract. *Deering v. Winchelsea*, 2 Bos. & Pul. 270; *Craythorn v. Swinburn*, 14 Ves. 160; *Hartwell v. Smith*, 15 Ohio St. 200; *Camp v. Bostwick*, 20 Ohio St. 337 [5 Am. Rep. 669]; *Oldham v. Broom*, 28 Ohio St. 41;

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Crouse v. Wagner, 41 Ohio St. 470; *Robinson v. Boyd*, 60 Ohio St. 57 [53 N. E. Rep. 494]; *Balt. & O. Ry. v. Walker*, 45 Ohio St. 577 [16 N. E. Rep. 475].

When contribution may be had. *Robinson v. Boyd*, 60 Ohio St. 57 [53 N. E. Rep. 494]; *Oldham v. Broom*, 28 Ohio St. 41; Brandt, Suretyship Sec. 255; 3 Pomeroy, Equity Sec. 1418; 7 Am. & Eng. Enc. Law (2 ed.) 328, 331, note par. 2.

Presumptions and burdens of proof. *Oldham v. Broom*, 28 Ohio St. 41; *Gaster v. Waggoner*, 26 Ohio St. 450; *Crouse v. Wagner*, 41 Ohio St. 470; *McNeil v. Sanford*, 42 Ky. (3 B. Mon.) 11; *Fernald v. Dawley*, 26 Me. 470; *Warner v. Price*, 3 Wend. 397; *Houck v. Graham*, 106 Ind. 195 [6 N. E. Rep. 594; 55 Am. Rep. 727]; *Whitehouse v. Hanson*, 42 N. H. 9; *Douglas v. Waddle*, 1 Ohio 413 [13 Am. Dec. 630]; *Robinson v. Boyd*, 60 Ohio St. 57 [53 N. E. Rep. 494].

When a second surety can limit his equitable liability to contribution. *Oldham v. Broom*, 28 Ohio St. 41; *Crouse v. Wagner*, 41 Ohio St. 470; *Whitehouse v. Hanson*, 42 N. H. 9; *McGee v. Prouty*, 50 Mass. (9 Mete.) 547 [43 Am. Dec. 409]; *Sisson v. Barrett*, 6 Barb. 199; *Monson v. Drakeley*, 40 Conn. 552 [16 Am. Rep. 74]; *Norton v. Coons*, 3 Den. 130; *Douglas v. Waddle*, 1 Ohio 413 [13 Am. Dec. 630]; *Barnet v. Young*, 29 Ohio St. 7; Story, Equity Sec. 498; Brant, Suretyship Sec. 258.

C. J. Hunt and O. W. Bennett, attorneys for defendant.

FERRIS, J.

This is an action brought by Conett, trustee, against Squair, administratrix, tried in special term and submitted to the court upon the testimony that was introduced in a suit brought by the trustee in bankruptcy of Carl F. Newton against the administratrix of the estate of H. H. Squair, the object of which suit was to compel contribution from the estate of Hugh Squair on account of money paid by Newton on a promissory note, of which the following is a copy:

“\$1,000.

Cincinnati, O., Feb. 12, 1896.

“Sixty days after date we, or either of us, promise to pay to the order of ourselves one thousand dollars at the Merchants National Bank. Value received.

(Signed)

“J. L. PORTER,

“C. F. NEWTON.”

On the back of that note appear three endorsements, that of J. O. Porter, C. F. Newton and H. H. Squair. These endorsements, as far as Porter and Newton were concerned, were made necessary by the fact that the note was drawn to the order of themselves, and, being a negotiable instrument passing by endorsement, it became necessary for them

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to sign their names in order to transfer title to the Merchants National Bank.

This note, therefore, furnishes in itself evidence of the primary responsibility on the part of the makers, Porter and Newton, and would indicate equally a secondary responsibility on the part of Squair.

The testimony of the plaintiff seeks to establish the fact that a relation contrary to that shown by the note would represent the true condition of the parties and that the real relation sought to be shown would justify the court in concluding that while the note seems to be the note of Porter and Newton, that in reality it was the note of J. O. Porter and that Newton, although his name appears as a joint maker with Porter, was in fact but a cosurety with H. H. Squair. If no testimony had been introduced, the conclusion of the court would undoubtedly have been that this was a joint note, that the primary responsibility was upon the makers and that Squair was an independent surety in favor of whom it might concern. The authorities are very clear with reference to the presumptions that arise from the form of the note itself; that by such note Squair was a guarantor of the principals as to all subsequent holders is sustained by a reading of the line of authorities beginning in *Champion v. Griffith*, 13 Ohio 228; *Robinson v. Abell*, 17 Ohio 43; *Castle v. Rickly*, 44 Ohio St. 490 [9 N. E. Rep. 136; 58 Am. Rep. 839], and it therefore may be stated that the rule in Ohio is that Squair is presumed to have intended to be liable as surety for the payment of the note by a reading of the note itself.

Ewan v. Brooks-Waterfield Co. 55 Ohio St. 596 [45 N. E. Rep. 1094; 35 L. R. A. 786; 60 Am. St. Rep. 719], and particularly that part of the decision as found at page 606 would leave no doubt as to the correctness of this conclusion.

Therefore, if the plaintiff shall maintain in an action brought, the burden of proof rests upon him to show a different relation from that shown by the note and to escape this legal presumption that attaches from the mere introduction of the note and the relations shown thereby.

Now, the contention that is sought for in this proceeding seeks to establish that different relation by showing that Porter was the principal and that Newton and Squair were in fact cosureties. Now as between themselves, the relations of the parties may be shown by parol, and the court is not concerned at this time in this hearing with matters that were prior to this time determined by a suit brought by the Merchants National Bank, and the conclusions there found not being plead as adjudicated matters raising the opportunity of a plea in bar, of exercising the rights that would be given under a plea in bar, but we are interested in the conclusions there reached only as they bear upon the issue made in this case, to wit: What is the real relation of the parties?

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The defense having stood upon the position that the note indicated clearly the relation of the parties and that Squair was there what he appeared to be, merely surety for Porter and Newton, the makers of the note, it is perfectly apparent that the plaintiff must establish by a preponderance of competent testimony that the position taken by him is correct as to the facts. The court has been considerably exercised in this matter in an attempt to clarify the situation as it related to the competency of the witnesses. There have been many translations made of the statute that seeks to put the living and the dead upon the same basis, making both stand upon an equality, but this case furnishes not only the difficulty of properly translating that (Rev. Stat. 5242; Lan. 8751, and item 4 in Rev. Stat. 5241; Lan. 8750), but also renders it necessary to say whether testimony that was taken in another suit before a court of competent jurisdiction having the right to adjudicate matters that would determine the real relation of the parties, would be legal evidence in this action. I refer, of course, to the suit of the Merchants National Bank before these same parties, tried before Judge Hollister. These matters of the competency of the witnesses must be determined as well as the sufficiency of the evidence in order to reach what the court feels to be the necessary conclusion in this case.

It is necessary, therefore, at the outset to know what witnesses were before the court. Newton was not. Under the provisions there could not have been done by indirection what the law expressly prohibits. If the testimony of Newton, as the court finds, was incompetent, by comparative reasoning the testimony of Squair taken in this former suit, offered, as the court believes, as a cover to let in the incompetent testimony of Newton, must also be held to be inadmissible.

The plaintiff had a right to introduce the testimony of Squair in his own behalf, his own testimony, but he could not do so for the purpose of contradicting him. In other words, the testimony of Squair introduced by Newton does not authorize Newton to introduce the testimony of Newton. Therefore, the exceptions seven and eight, under Rev. Stat. 5242 (Lan. 8751), clearly relate to former testimony in the same suit and not the testimony taken in another suit in another court, and, if the court has properly comprehended the rule in *Roberts v. Briscoe*, 44 Ohio St. 596 [10 N. E. Rep. 61], then the testimony of Newton and Squair is to be eliminated from consideration.

Now in behalf of the plaintiff, testimony was introduced in the shape of a deposition of Porter and also of a party by the name of Hurford, and except such testimony as appeared from the facts in such depositions, nothing was introduced by the defense, who relied upon the legal presumptions arising from the existence of the note, and if the court is right in saying that the testimony of Newton is not to be con-

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sidered under the authorities; also of *Jackson v. Ely*, 57 Ohio St. 450-462 [49 N. E. Rep. 792], predicated upon the proper translation, as the court believes, of the statutes heretofore referred to (Rev. Stat. 5241-5244; Lan. 8750-8753), then the plaintiff must rely upon the testimony of Porter with whatever additional effect should have been given by the testimony of Hurford to sustain the burden that the law places upon him of showing a relation contrary to that shown by the note.

What is the testimony of Porter and what were the facts as shown by his testimony? It seems reasonably clear to indicate that the indebtedness for which this note was given was the indebtedness of Porter and that Porter received the proceeds of the note and not Newton is equally clear. Testimony is not as clear, possibly, as the court would like to have it appear as to Newton's knowledge of the situation communicated to Squair, but here the law places in and charges upon Squair the duty of ascertaining the real relation between prior parties. Failing to do this, he must accept the responsibilities that attach. Now, if Squair at the time of the signing of the note affixed his signature upon the back of the note with Newton, and that fact was that Newton at that time was a mere surety, in law then he became, by reason of that fact, a cosurety with Newton, and if the duty was upon Squair in law to inquire as to the real relations of the parties he was not justified in law in relying upon the *prima facie* facts, and if the testimony should develop the fact that Newton while appearing as maker was in fact a surety, their responsibility would still, nevertheless, be upon Squair to contribute his share toward the payment of the entire note in the event that the maker failed to discharge the primary obligation.

The leading case relied upon to sustain the correctness of this proposition is *Whitehouse v. Hanson*, 42 N. H. 9, but the text books (Randolph on Commercial Paper and Daniel on Negotiable Instruments) adhere to the correctness of this conclusion.

Now, therefore, if the court shall conclude that the testimony furnishes proof that Newton signed the note for Porter with the understanding that Squair was to be a surety with him, then the plaintiff was entitled to the relief sought for unless this evidence be rebutted and this presumption be met with testimony to a contra effect, and there is no testimony whatever to rebut this presumption.

But the testimony does establish the fact that Porter understood that the money was for his benefit and that Newton understood this fact and that Squair is not shown to have known it.

The plaintiff having thus introduced testimony of a competent nature, and no testimony having been offered to rebut the presumption that arose from the new condition of affairs, and the note having made out a *prima facie* case only, and the testimony having shown a different

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relation between the parties, and the court refusing to consider the testimony of Newton and Squair for the reasons above stated, there seems to be nothing for the court to do except to say that the relations shown by the note are contrary to those shown by the testimony of a competent nature. It must follow, therefore, by the rules governing the production of testimony, that the plaintiff having sustained the burden of proof in the matter thus required, it must follow that Newton and Squair were sureties, and, if sureties, they were cosureties, and that relation exists until the defendant rebuts such presumption that has arisen by those proofs. No testimony that the court regards as competent having been introduced to disclose a different condition of affairs, the position of the plaintiff has been sustained. *Oldham v. Broom*, 28 Ohio St. 41; *Baker v. Kellogg*, 29 Ohio St. 663; *Crouse v. Wagner*, 41 Ohio St. 470; *Robinson v. Boyd*, 60 Ohio St. 57 [53 N. E. Rep. 494]; *Whitehouse v. Hanson*, 42 N. H. 9; *McNeil v. Sanford*, 42 Ky. (3 B. Mon.) 11; *Warner v. Price*, 3 Wend. 397, and the instructive cases in *Houck v. Graham*, 106 Ind. 195 [6 N. E. Rep. 594; 55 Am. Rep. 727]; *McGee v. Prouty*, 50 Mass. (9 Metc.) 547 [43 Am. Dec. 409]; *Sisson v. Barrett*, 6 Barb. 199; *Monson v. Drakeley*, 40 Conn. 552 [16 Am. Dec. 74].

The plaintiff, therefore, having maintained the burden of proof by furnishing testimony preponderating in favor of the position set out in the petition, is entitled to contribution.

The object of the testimony introduced was to establish the real relation between the parties not shown by the note, and the testimony being uncontradicted under the legal rule that the court has here stated that the indebtedness was incurred entirely for the benefit of Porter, for whom Newton was a surety, and the testimony establishing the fact that Squair stood in exactly the same relation to Porter as Newton did, the law of contribution between sureties should prevail, and Newton having shown payment in a greater sum than his proportion, would be entitled to recover the difference between the amount of his liability and the amount paid, and is entitled to recover the excess from the estate of H. H. Squair. Whatever may be the amount thus shown to have been paid by him will be the amount for which the court will enter up judgment in favor of the plaintiff and against the estate of H. H. Squair.

Breitenstein, In re.

GUARDIAN AND WARD—APPEAL.

[Summit Common Pleas, August, 1906.]

ELIAS BREITENSTEIN, IN RE.

PERSON ADJUDGED IMBECILE CANNOT APPEAL FROM FINDING WHERE NO GUARDIAN IS APPOINTED.

Application was made to the probate court for the appointment of a guardian for Elias Breitenstein; the court, on hearing, entered on the record its finding and decision that due notice of said application had been given, that said Elias Breitenstein was a resident of the county and was an imbecile and that it was necessary to appoint a guardian for him; but no guardian was appointed and no further order was made by the court: *Held.* Elias Breitenstein is not entitled to appeal from such finding or decision of the probate court.

[Syllabus by the court.]

APPEAL from probate court.

C. M. Anderson, for applicant.

Kohler, Kohler & Mottinger, for Breitenstein.

WASHBURN, J.

John Breitenstein made application to the probate court of Summit county, for the appointment of a guardian for the person and estate of Elias Breitenstein, notice was given and hearing had, and the journal entry showing the action taken by the probate court is as follows:

"This day this matter came on to be heard on the application of John Breitenstein for the appointment of a guardian for the person and estate of Elias Breitenstein, a resident of Franklin township, in said county, on the ground that he is an imbecile, and was submitted to the court on the evidence; on consideration whereof the court find that said Elias Breitenstein and all his next of kin resident of said county, have had due notice of the pendency and prayer of said application according to law and our former order. The court further find from the evidence that said Elias Breitenstein is an imbecile, and that by reason thereof he is incapable of caring for his person and estate. To all of said finding said Elias Breitenstein, by his attorneys, does here and now except. Thereupon came the said Elias Breitenstein and filed his written motion in this court for a new trial. Thereupon this matter came on to be heard on said motion and the evidence, and was submitted to the court; on consideration whereof the court overrules said motion, to which order said Elias Breitenstein excepts, and gives notice of his intention to appeal this matter to the common pleas court of said county, for which purpose bond is fixed at the sum of \$200. Thereupon came said Elias Breitenstein and filed his appeal bond herein in the sum of \$200 with Mary Arter and Thomas Baugman as sureties thereon to the approval of the court. It is, therefore, by the court ordered that a transcript of the docket and journal entries herein, together with the

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original papers filed in this matter, be duly certified together for the purposes of filing, in the court of common pleas of said county."

The cause has been submitted to this court on motion to dismiss said appeal, on the ground that the action of the probate court was not such an order, decision or decree as is appealable.

Revised Statutes 6407 (Lan. 9983), provides that,

"Appeals may be taken to the court of common pleas, from any order, decision or judgment of the probate court * * * in proceedings to appoint guardians * * * for imbeciles, * * * by any person against whom such order, decision or decree shall be made, or who may be affected thereby."

The "order, decision or judgment" referred to in this statute means a final order, decision or judgment, and although it is difficult always to determine just what orders, decisions and judgments are final, the policy of the law seems to be to prevent delays and interruptions in proceedings in probate court, by permitting appeals from only such orders, decisions and judgments as are plainly final in their character. *Aultman v. Seiberling*, 31 Ohio St. 201; *Brigel v. Starbuck*, 34 Ohio St. 280.

In the opinion of the Supreme Court in *Brigel v. Starbuck*, page 288, the following language is used:

"And we believe that it may be stated as a general rule, that an order, to be appealable, must affect property rights, and not merely the administration of the trust."

The property rights of Elias Breitenstein were not affected by the action taken by the probate court in the case at bar; until a guardian was duly appointed, there could be no interference with, nor control of, his property or person. The action of the probate court gave no one authority to take possession of his property, collect or pay his debts, provide for his support, or bring or defend suits for him. All of these things a guardian duly appointed could do.

Not only does the action taken by the probate court fail to affect the property rights of Elias Breitenstein, but a careful reading of the journal entry of the probate court in question, shows that the order made by the probate court, if it can be said there was any order at all made, falls far short of being a final order; it is more in the nature of a finding of fact, which gave the court jurisdiction and authority to make a final order.

The law did not even require the probate court to enter on the record the finding that said Elias Breitenstein was an imbecile and that it was necessary to appoint a guardian for him. That is according to the approved practice and is quite proper.

But, strictly speaking, while the law required the probate court to

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find these facts before a guardian could be legally appointed, it did not require the probate court to make a record of such finding.

As was said in *Shroyer v. Richmond*, 16 Ohio St. 455, 465, the law requires the probate court to keep a record, "which shall contain an entry of the appointment of executors, administrators and guardians, and all partial and final accounts of executors, administrators and guardians, and the orders and proceedings of the court thereon." Whilst the statute requires the record to contain 'an entry of the appointment' of all guardians, it nowhere requires that the record shall show the existence of a state of facts such as to warrant the exercise of its authority, or the evidence upon which the court relied, in making the appointment. Nor does any rule of law require this of such a court."

In this same case, at page 466, the court speaks of the order of appointment as being the "final order," in a proceeding for the appointment of a guardian.

"All questions necessarily arising in the case, become *res adjudicata*, by the final order of appointment, which binds all the world, until set aside or reversed by a direct proceeding for that purpose."

It seems plain to me that the order made by the probate court in this case at bar is not such an order as is appealable, and the appeal will therefore be dismissed.

INDICTMENTS—JURY.

[Franklin Common Pleas, April 17, 1906.]

*FENDRICK V. STATE OF OHIO.

1. INFORMATION FOR MISDEMEANOR NEED NOT CONCLUDE WITH THE WORDS, "CONTRARY TO THE FORM OF THE STATUTE," ETC.

An affidavit or information on which an arrest for a misdemeanor is based need not conclude with the words, "Contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio."

2. JURY FROM CITY MAY TRY ACCUSED FOR OFFENSE COMMITTED OUTSIDE OF CITY BUT IN DISTRICT WITHIN JURISDICTION OF COURT.

Where the jurisdiction of a police court embraces a city and certain territory beyond its limits and a defendant is accused of a crime committed beyond the limits of the city but within the jurisdiction of the court, a trial by a jury composed of men entirely from within the city limits does not violate Sec. 10 of the bill of rights of the constitution.

[Syllabus approved by the court.]

ERROR to police court of the city of Columbus.

J. M. Butler and C. E. Carter, for defendant.

C. D. Saviers, for plaintiff.

*Reversed as to the second paragraph of the syllabus, *Fendrick v. State*, 28 O. C. C. 000.

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BIGGER, J.

This is a proceeding in error from the judgment of the police court of this city.

The first ground relied upon as being error in the proceeding in the police court is, that the police court committed error in overruling a motion to quash the information or affidavit upon which the plaintiff in error was arrested and prosecuted for the reason that the affidavit fails to conclude with the words, "Contrary to the statute in such case made and provided and against the peace and dignity of the state of Ohio." This is a statutory requirement in the case of indictments for crime. But, as this was only a misdemeanor, no indictment was necessary and as this affidavit contained all that is required by statute in the case of affidavits, Rev. Stat. 7134 (Lan. 10887), I think it is sufficient without the words required in concluding an indictment.

The next ground relied upon is, that the offense was committed south of the south corporation line of the city and that the jurors drawn to try the case were selected from the city only, and it is claimed that this violates the constitutional provision, Sec. 10 of the bill of rights of the Constitution of 1851, which grants to every defendant the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. This raises a serious question and one upon which there do not seem to be many decisions involving the exact question at issue here. The jurors who tried this case were selected from the electors of this county in the sense that they were residents of the county, but they were selected from the district in which the police court has jurisdiction, to wit, over the city of Columbus, but not from that portion of the district lying beyond the city limits. That is, they were not selected from the entire district thus covered by the jurisdiction of the police court.

The states of Minnesota and Wisconsin each have a statute which provides that offenses committed within one hundred rods of the dividing line between two counties may be alleged in the information to have been committed in either of them, and may be prosecuted and punished in either county and the court of that county whose process shall be first served upon the defendant shall acquire jurisdiction. It was claimed in those states that when an offense was tried in a county in which the offense was not committed that it violated this constitutional requirement, but in both states the claim was decided adversely to this contention. *State v. Stewart*, 60 Wis. 587 [19 N. W. Rep. 429; 50 Am. Rep. 388]; *State v. Robinson*, 14 Minn. 447.

The syllabus in the Minnesota case is:

"That section is not in conflict with Sec. 6, Art. 1 of the constitution which in criminal prosecutions gives the right to a trial by jury of the county or district wherein the crime shall have been committed."

The syllabus of the Wisconsin case is:

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"The statute providing that offenses committed within one hundred rods of the dividing line between two counties may be prosecuted and punished in either, is not in violation of Sec. 7, Art. 1, Const., securing to the accused the right to a trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law."

In view of these decisions by courts of last resort, I have concluded that it is my duty to hold that the objection made here, that the plaintiff in error was not tried by a jury from the county or district wherein the offense is alleged to have been committed, is not well founded and is overruled.

As to the evidence of the reputation of the house and of certain inmates, this has been held to be competent but not conclusive as to the character of the house.

Holker v. Hennessey, 141 Mo. 527, 535 [42 S. W. Rep. 1090; 39 L. R. A. 165; 64 Am. St. Rep. 524]; *Damp v. Dane (Town)*, 29 Wis. 419, 425.

As to the sufficiency of the evidence I think there was evidence in the case as to the conduct of the parties in and about that place which might properly lead to a conviction at the hands of a jury.

On the whole I do not find any error in the record which in my opinion calls upon the court to reverse the judgment and finding of the police court, and the decision is affirmed.

BILLS OF EXCEPTION—MAYOR'S COURT.

[Defiance Common Pleas, June 21, 1906.]

HERMAN CAPPLE V. STATE.

1. **BILL OF EXCEPTIONS—FAILURE OF MAYOR TO TRANSMIT WITHIN TEN DAYS CAN NOT PREJUDICE ONE PROSECUTING ERROR.**

It is the duty of a mayor to transmit to the common pleas court a bill of exceptions and the other papers connected therewith within ten days after the allowance and signing of the same by him, but failure on his part to do so until over twenty days have passed cannot prejudice the party seeking to prosecute error.

2. **BILL OF EXCEPTIONS—SETTING TIME FOR ALLOWANCE OF BILL AT CLOSE OF TRIAL SUFFICIENT COMPLIANCE WITH REV. STAT. 6565 (LAN. 10147).**

There is a substantial compliance with the terms of Rev. Stat. 6565 (Lan. 10147), which provides that a party must except to a decision at the time it is made and time must be given to reduce the exceptions to writing, where the docket shows that time for the allowance of a bill of exceptions was fixed at the close of the trial, although the motion to discharge the defendant, the overruling of which was objected to, was decided at the close of the testimony.

3. **LOCAL OPTION LAW—TRAVELING MAN GIVING AWAY SMALL SAMPLES OF LIQUOR MAY BE CONVICTED UNDER LOCAL OPTION LAW.**

A traveling man, representing a wine company, may be convicted of the offense of giving away intoxicating liquor as a beverage in violation of

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the local option law, on evidence that he gave away samples of his liquors to be tasted by his prospective purchasers, such samples being about a teaspoonful each.

4. INTOXICATING LIQUORS—LOCAL OPTION LAW—MAYOR MAY ORDER FINE PAID TO VILLAGE.

Under Rev. Stat. 4364-20g (Lan. 7279) a mayor of a village has authority to order a person, convicted and fined for giving away intoxicating liquor as a beverage, to pay the fine to the village.

[Syllabus approved by the court.]

ERROR to mayor's court.

Donovan & Warden, for plaintiff in error.

G. D. Simmons, for defendant in error.

Motion to strike bill of exceptions and transcript from files. Rev. Stat. 6565 (Lan. 10147).

Whether a gift of intoxicating liquors was made to be drank as a beverage is a question for the jury. *Mitchell v. State*, 63 Ind. 574.

Filling orders for intoxicating liquors in violation of Beal law. *State v. Low*, 12 Dec. 201; *State v. Cohen*, 65 Kan. 849 [70 Pac. Rep. 600].

Quantity of intoxicating liquors given away sufficient to constitute offense. *State v. Jones*, 88 Minn. 27 [92 N. W. Rep. 468]; *State v. Handler*, 178 Mo. 38 [76 S. W. Rep. 984].

Upon sufficiency of affidavit. *Stewart v. State*, 25 O. C. C. 438; *Geiger v. State*, 3 Circ. Dec. 141 (5 R. 283); *Wells v. State*, 14 Dec. 196; *State v. Handler*, 178 Mo. 38 [76 S. W. Rep. 984]; *Wolf v. State*, 19 Ohio St. 248; *Gordon v. State*, 46 Ohio St. 607 [23 N. E. Rep. 63; 6 L. R. A. 749]; *Williams v. State*, 35 Ohio St. 175.

Disposition of fines. Revised Statutes 2099, 4364-20g, 6801a, 6801b (Lan. 3430, 7279, 10395, 10396).

SNOOK, J.

On November 24, A. D. 1904, Herman Capple was arrested for the violation of the local option law, which was then in force in the village of Hicksville, Defiance county, Ohio. The affidavit charges, "that on or about the twenty-third day of November in the year 1904 in the said village of Hicksville, Defiance county, Ohio, one Herman Capple, who was not then and there a regular druggist, did then and there unlawfully give away intoxicating liquors as a beverage to Harry Brandon and John C. Bevington.

"Affiant further says the intoxicating liquors given away by the said Herman Capple to the said Harry Brandon and John C. Bevington as aforesaid was not delivered and furnished in wholesale quantities.

"Affiant further says the intoxicating liquors given away as aforesaid by the said Herman Capple to the said Harry Brandon and John C. Bevington were not given away as aforesaid in the private dwelling of the said Herman Capple.

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"Affiant further says that the giving away of said intoxicating liquors as aforesaid by the said Herman Capple was then and there prohibited and unlawful and contrary to the form of the statutes of the state of Ohio in such cases made and provided and further this affiant saith not."

Defendant plead "not guilty," and on the trial before the mayor was found guilty and sentenced to pay a fine of \$50 and the costs of prosecution. It was further ordered that said fine be paid to the village of Hicksville, Ohio, and that the defendant stand committed to the work-house at Toledo, until the fine and costs were paid.

Upon the conclusion of the trial, and after judgment had been pronounced, the court fixed November 30, A. D. 1904, as the day for the signing and allowing of a bill of exceptions in said cause, and said bill was signed and allowed by said court on said day. Thereupon the mayor transmitted the bill of exceptions to the counsel for the plaintiff in error, who filed the same, together with the original papers, and a petition in error, in this court December 23, A. D. 1904, after having first obtained leave of this court to so do. Thereupon defendant in error filed a motion to strike the bill of exceptions and the transcript of the mayor's docket in the case from the files, for the reason: That the same were not filed in this court within ten days of the allowance and signing of the bill of exceptions; and, because no time was fixed for the allowance and signing of a bill of exceptions at the time the motion of the plaintiff in error herein to discharge the defendant below was heard and overruled by the Mayor; said motion having been interposed at the close of the evidence offered on the trial below and having been then overruled.

It will be seen that the bill of exceptions was allowed on November 30, 1904, while the petition in error and transcript were not filed in the court of common pleas until December 23, 1904, and not within ten days from the time said bill of exceptions was allowed. It is claimed for this reason that the bill of exceptions should be stricken from the files, and, in support of this claim, we are cited to Rev. Stat. 6565 (Lan. 10147), which insofar as it applies to the questions so raised, reads as follows:

"And if the same is correct he shall sign said bill of exceptions and file the same with the papers in the case, and note such signing and filing in his docket, and transmit the same with the transcript of his docket and original papers, within ten days of the date of such signing, to the clerk of the court of common pleas."

This provision of the statute is construed by the circuit court, in *Borsodi v. State*, 7 Circ. Dec. 31 (13 R. 275), where the court say:

"It is the duty, by law, of the justice of the peace to transmit a

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bill of exceptions when by him allowed, within ten days, * * * but if he fails to do so, unless he has demanded his fees therefor and they are not paid, the person taking the bill is not prejudiced, by his failure, but may within the six months * * * file the bill of exceptions and other papers."

The discussion of the question in point in this case is quite clear, and we think decisive of the question urged by the plaintiff in error herein. Under this statute it is the duty of the mayor to transmit the papers to the clerk of the common pleas court, and failure on his part to so do can in nowise prejudice the party seeking to prosecute error to the higher court. While the time for the allowance of a bill of exceptions was not fixed when the court disposed of the motion of the defendant below, for his discharge, interposed at the close of the testimony offered in the case, yet at the close of the trial the court must have fixed a time for the allowance of a bill of exceptions, for at the end of the transcript we find this entry:

"Thereupon, the court having fixed a time for the allowance and signing of a bill of exceptions herein on the thirtieth of November, 1904, now, on this thirtieth day of November, A. D. 1904, counsel for defendant presents this bill of exceptions, and asks the same to be allowed and signed and made a part of the record in this cause, which is accordingly done this thirtieth day of November, A. D. 1904."

We think this is a substantial compliance with Rev. Stat. 6565 (Lan. 10147), where it is provided that,

"The party objecting to the decision must except at the time the decision is made, and time shall be given to reduce the exceptions to writing."

Revised Statutes 6565 (Lan. 10147) was construed by the Supreme Court, in the case of *Lewis v. Bancroft*, 53 Ohio St. 92 (41 N. E. Rep. 32), and in the opinion of the court, page 94, the court say:

"The docket entry does not show that plaintiff below, during the trial, or even at the close thereof, required time to prepare his bill of exceptions, and no time was appointed by the justice when the bill of exceptions should be settled and signed."

Thus clearly intimating that if a time was fixed at the close of the trial for the allowance of a bill of exceptions the requirement of the statute would be met. It seems to us that any other holding would be extremely technical and we therefore conclude that the motion to strike the bill of exceptions from the files should be overruled.

The next question for decision in the case is, Was the affidavit good? Revised Statutes 4364-20e (Lan. 7277) provides what needs to be set forth in such an affidavit. And all that needs to be said on this subject is. that the affidavit in this case wholly meets the requirements set forth in that section of the statute.

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The next question to be decided is, Did the mayor err in overruling the motion of the defendant below, for his discharge, interposed at the close of the testimony, on the ground that there was no evidence offered in the case, supporting the charge in the affidavit? The evidence, in substance, shows that the defendant was a traveling man, representing the Napoleon Wine Company; that his business was to procure orders for his house, for wines and whiskey; that in doing so he traveled around the country, and when he met a prospective customer he gave him a small sample of the liquor he wished to sell, to taste, in order to procure him to make a purchase; that he gave to one Harry Brandon two or three such samples, one whiskey and the others wine, about a teaspoonful in each instance. And he gave about the same amount to one John C. Bevington.

It is urged by plaintiff in error that the amount given away was so small that it does not come within the meaning of the statute, wherein it is provided that the liquor must be given away as a beverage. The statute fixes no limit as to the amount to be given away before one shall be guilty of a violation thereof, and Rev. Stat. 4364-20c (Lan. 7275) names and fixes the only exceptions to the statute; and it seems to us, that if one gives away intoxicating liquors within the prohibited territory, no matter how small the amount, if the giving away does not come within the exceptions fixed in Rev. Stat. 4364-20c (Lan. 7275), then such giver must be guilty. Nor is this changed by the use of the word "beverage" in the statute, for the use of the word does not materially change the law. Webster's dictionary defines the word "beverage" as "a liquid for drinking; drink, usually applied to drink artificially prepared and of an agreeable flavor; as an intoxicating beverage; specifically, a name applied to various kinds of drink." The Century Dictionary defines the word "beverage" to mean, "drink of any kind; liquors for drinking; intoxicating beverages." Surely it cannot be contended that the liquor given by the defendant was not a drink, and that it was intended that the person to whom it was given should not drink the same.

The facts in this case come directly within the spirit of the definition of "beverage" as laid down above by Webster and the Century Dictionary. This contention is clearly borne out by the reasoning of the court in the case of *People v. Hinchman*, 75 Mich. 587 [42 N. W. Rep. 1006, 1007; 4 L. R. A. 707], where the court say:

"Worcester defines 'beverage' as follows: '1. liquor to be drank; drink.' Webster defines the word as '(1) liquor for drinking.' If, therefore, Hinchman sold the whiskey to Berger as a beverage, he sold it to him to be drank; that is, to be used as a drink."

Nor do we think that, in the absence of a statutory provision, the

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court would be warranted in fixing the amount that must be given away before one could be convicted under this statute, for it seems that to try to so do would lead the court to end of trouble. For, would the limit be a teaspoonful? Or a glass? Or would it be two glasses? It is clearly the duty of the court to refrain from reading into a statute any condition or exception that is not found therein, and for the court, in this case, to find the limit as to the amount that must be given away before one could be prosecuted under this statute, would be to read into the statute an exception that is plainly not found therein. Further this question has been passed upon by the court of last resort of at least two states. If these cases are not like the case at bar in all their facts, they at least decide the principle involved in the case at bar. We think, however, that the facts involved in those cases are substantially the same as the facts in the case at bar, and we would invite the attention of anyone interested in the subject to a careful consideration of these cases, where the question is ably and thoroughly discussed. *State v. Jones*, 88 Minn. 27 [92 N. W. Rep. 468]; *State v. Hesterly*, 178 Mo. 43 [76 S. W. Rep. 984].

The only other question made by plaintiff in error is, that the court erred in ordering the fine, which was imposed upon the defendant, to be paid to the village of Hicksville. There was no error in this action of the court, as Rev. Stat. 4364-20g (Lan. 7279) provides that all fines collected under the provisions of the act which was violated shall be paid into the treasury of the corporation wherein the fine is imposed. Under this section of the statute the Mayor had jurisdiction to order the fine to be paid to the village.

For these reasons the action of the mayor will be affirmed with costs.

TAXATION—INSURANCE.

[Superior Court of Cincinnati, Special Term, 1906.]

RUDOLPH K. HYNICKA, TREAS. V. UNION CENTRAL LIFE INS. CO.

1. ACCUMULATED DEFERRED DIVIDENDS AND RESERVE FUND NOT DEBTS DEDUCTIBLE FROM CREDITS.

A life insurance company may deduct from the total amount of its "credits" returned for taxation neither the amount of the accumulated deferred dividends on its life rate endowment policies, so-called, nor the total amount of its reserved fund, or reinsurance reserve, required by Rev. Stat. 3602 (Lan. 5755) as a protection to its policy holders. Neither of these items is a "legal *bona fide* debt owing" as contemplated in Rev. Stat. 2730 (Lan. 4033), for both are contingent liabilities, and the statute named, by its phraseology, refers only to fixed liabilities to pay sums certain, due or to become due at all events.

2. USE OF WORD "DEBTS" IN REV. STAT. 3598 (LAN. 5751) AND IN REV. STAT. 2730 (LAN. 4033) NOT SYNONYMOUS—CONSTRUCTION OF STATUTE.

The word "debts," as used in Rev. Stat. 3598 (Lan. 5751) in the fourth paragraph thereof, may not be construed to mean the same as "legal

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bona fide debts owing," as used in Rev. Stat. 2730 (Lan. 4033), relating to deductions from "credits" for the purpose of equalizing the burdens of taxation. Such an interpretation would render the latter statute unconstitutional and is therefore not to be adopted.

3. OUTSTANDING CHECKS DO NOT REDUCE AMOUNT UNLESS BANK IRREVOCABLY COMMITTED TO PAYEE—CHECK NOT ASSIGNMENT OF DEPOSIT PRO TANTO.

Moneys on deposit in bank and subject to the demand of the depositor being taxable by virtue of Rev. Stat. 2731 (Lan. 4034), the amount of such deposits on the day for taxation as shown by the books of the bank to be to the credit of the depositor cannot be reduced by such depositor for the purpose of avoiding taxation thereof by a showing that checks were outstanding against such deposits, whether such checks were drawn on the bank of deposit or on a foreign bank with an arrangement with the depositing bank for payment, unless it be shown that the checks were either paid by the bank of deposit before the day for taxation or that such bank was irrevocably committed to the payee by certification or other equivalent process. The checks themselves are simply executory promises to pay and cannot operate as assignments *pro tanto* of the funds on deposit.

4. AMOUNT OF OUTSTANDING CHECKS, DRAWN FOR LOANS TO BE MADE, MAY NOT REDUCE AMOUNT ON DEPOSIT AND BECOME "CREDITS" REDUCIBLE BY "LEGAL BONA FIDE DEBTS OWING."

An insurance company having deposits in bank may not check upon such deposits for the delivery of money to complete mortgage loans and deduct the amount of such checks from the amount in bank on the day of taxation, where such checks are still outstanding at that date, and then include such loans as "credits" in its returns for taxation, thus making them subject to deductions of "legal *bona fide* debts owing." The act of the company cannot thus change the legal status of the taxable property which remains "money on deposit."

[Syllabus approved by the court.]

A. B. Benedict, for plaintiff.

Lawrence Maxwell and Robert Ramsey, for defendant.

HOFFHEIMER, J.

This was an action brought by the treasurer of Hamilton county to recover omitted taxes. By virtue of the statutes provided in such behalf, the auditor of the county proceeded to investigate the returns of defendant company for the years, 1897 to 1901, inclusive, and for the amounts found by him to be omitted he charged simple taxes. Recovery for the amounts so charged and the penalties is here sought. By agreement between the parties a jury was waived and the cause was submitted to the court on an agreed statement of facts and also on evidence. The claim of plaintiff involves the right to subject to taxation certain large sums of money on deposit in various local banks in the city of Cincinnati, on the tax day of each of the years in question, less the gross amounts returned by the defendant.

The defendant claims such sums were in effect wiped out by the company's outstanding checks, which had been issued by it for "collateral loans and investments" and for proposed mortgage loans; as the proposed mortgage loans were entered up as completed transactions simultaneously with the issuance of its checks, and inasmuch as these

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mortgage loans were returned by the company as "credits," the company claims that it indirectly paid taxes on such deposits, and should not again be taxed thereon.

Still another and very important question is to be here determined. Defendant company for the years in question returned for taxation as credits sums running into millions. These "credits" were then wiped out because the "debits" deducted were far in excess of the "credits."

Examining the company's return we find to be deducted "reinsurance reserve fund and all outstanding obligations to policy holders." Stipulation, page 18. This item includes (a) the reserve or reinsurance fund of the company; (b) the accumulated deferred dividends, or undivided or surplus profits of the company's life rate endowment policies. The auditor ascertained the amounts deducted from credits on account of "accumulated deferred dividends," arising on the policies of the character mentioned, and then he placed on the duplicate an amount of credits for taxation equal thereto. The contention therefore is, as to the right of the company to deduct from its "credits" as a "legal *bona fide* debt owing," "accumulated deferred dividends" or "undivided profits" arising out of the life rate endowment policies in question.

Addressing ourselves to a consideration of the question as to the "accumulated deferred dividends," I may say, that if it appears that the company's obligation or liability under this life rate endowment policy is contingent, then there was no "legal *bona fide* debt owing," within the purview of the tax statute, and the item was not legally deductible. In other words the question confronting the court is this: Does the defendant company, by virtue of a policy of the character mentioned, incur an actual certain fixed liability for a certain sum of money, which sum of money if not due lacks only falling due to be enforceable by action? Is there an existent debt as contradistinguished from a mere liability which may or may not ripen into a debt? Does the element of time only prevent enforceability of the liability? If so, the obligation may be said to be absolute. *Id certum est, quod reddi certum potest.* Within the meaning of the tax law then there would be a legal debt "owing." If, on the other hand, there is no definite certain liability due or to become due absolutely and at all events, and the liability is dependent upon a contingency—one which may only ripen on the happening of some contingency—such a liability could not be considered as a debt owing. To ascertain whether there is a debt it was said in *People v. Arguello*, 37 Cal. 524, 525:

"Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum of money payable

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upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened."

In order, therefore, to ascertain whether the accumulated deferred dividend was a debt, or a debt "owing" and as such deductible, we must at the outset examine the policy. Exhibit I, auditor's finding. For the policy is the basis of the company's obligation or liability. It is the company's promise to its policy holder. Now the answer in this case admits that the policy is a contract for one year with an option to renew. If not renewed, the policy lapses. In the next place the policy provides that upon failure to pay any of the first three annual premiums the policy lapses and becomes unenforceable. After three years premiums are paid in, the policy may still lapse and be forfeited. Then the policy holder, according to the terms of the policy, has two options; (a) He may take a paid-up policy for a less amount than the sum named in the policy; or (b) he may default in payment and take a paid-up nonparticipating policy for a specified time (one year and forty-two days). Nonparticipating means that the policy does not participate in the profits. See stipulation, page 21.

It is evident then, that a policy, that has not run more than three years, may lapse through the default of the policy holder. Certainly then, it is contingent whether the company will ever be obliged to pay anything on such a policy. If the policy has run more than three years and the policy holder defaults, while he may exercise his option to surrender his policy and receive a paid-up policy for a less sum—according to the table on the back of the policy—it is contingent whether he will exercise such option. If he pays for a number of years and defaults and receives a paid-up nonparticipating policy for the short period mentioned—one year and forty-two days—it is contingent whether any obligation of the company will mature or ripen, for obviously unless the death of the policy holder ensued during that stipulated period—one year and forty-two days—the obligation is at an end and, as to such policy, the company must pay nothing. This analysis of the policy establishes conclusively: First, that as to their life rate endowment policy less than three years old, the company's liability is contingent; second, that as to their life rate endowment policies over three years old the company's liability is likewise contingent.

In addition to the uncertainty with regard to any ultimate ripening of the liability as thus revealed, upon still closer scrutiny, we find in the policy the following clause:

"The company further agrees to pay to the insured the amount of said insurance at its office in the city of Cincinnati, Ohio, whenever the premiums paid on this policy and its equitable proportion of the company's profits combined, less its share of losses and expenses, equal the amount of the policy."

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Now, suppose the policy holder never defaults, what profits is he entitled to ? The promise is not to pay profits or dividends, because the profits or dividends may never equal the face of the policy. True, the custom or method of the company was to pass a resolution directing a distribution of the net profits to the various classes of policy holders (stipulation, page 14) and entering the proper credit on each life rate endowment policy, on the life rate endowment register—subsequently on abandoning the register on the card—yet that entry did not as contended for by defendant represent any present liability or existent debt of the company to the particular policy holder so represented.

Counsel for the company *arguendo* contends that the aggregate sum of money credited to the policies of this class on the register or card became a definite fixed sum which the company was under obligation to pay to persons ascertainable at the time of payment. This contention, however, is not tenable. In the first place, the sum so credited certainly was not demandable by any policy holder of that class. The policy holder was in no sense a creditor as to such fund, and if he was not a creditor there certainly could not be a debt. If defendant's argument were correct, it would suffer the company by its independent act to fix the obligation, whereas that is fixed by the contract itself, and the contract speaks as to when the company shall pay and under what circumstances. In the event of default by the policy holder the sum or sums credited would be wiped out in whole or in part, and in the event of net loss by the company independent of any act of the policy holder, all premiums paid in would be wiped out, or at any rate *pro tanto* the net loss.

While it would seem the almost uninterrupted prosperity of the company would render the latter *potentia remotissima*, nevertheless the contingency might occur. Once in the history of the company it actually did occur, and then the company by its own act recognized that the mere crediting of profits represented no fixed existent debt because net losses were deducted by it. So that whether "there will be profits or net losses to be deducted" is dependent on wise and successful management, on prosperous conditions generally; in short, on so many things that no rule could be laid down by which it could be said the claim on the endowment feature is bound to become due absolutely and at all events.

Somewhat similar questions were before this court and the Supreme Court in *Amazon Ins. Co. v. Cappeller*, 8 Dec. Re. 493 (8 Bull. 247), affirmed by the Supreme Court in *Insurance Co. v. Cappellar*, 38 Ohio St. 560; *Cincinnati Equit. Ins. Co. v. Gibson*, 11 Cin. Ct. Index, No. 175, decision by R. B. Smith, affirmed in *German Mut. Ins. Co. v. Gibson*, 14 Dec. 80.

These cases, it seems to me, are decisive of the questions raised here.

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Revised Statutes 2730 (Lan. 4033) authorizes the deduction from credits of legal *bona fide* debts owing. In what way can it be said the item "accumulated deferred dividends" thus deducted was a debt—a legal *bona fide* debt owing? In *Insurance Co. v. Cappellar*, *supra*, page 570 our Supreme Court gave us a definition of "a legal *bona fide* debt owing:"

"Unless the context requires," said McIlvaine, J., "some other construction surely the phrase 'legal *bona fide* debts owing by such persons' can mean nothing more than a fixed liability to pay a sum or sums certain, due or to become due at all events, to some other person or persons—it being understood, of course, that that is certain which can be made certain."

And in the general term when the same case was up for consideration, Harmon, J. (Force and Worthington, JJ., concurring) in *Amazon Ins. Co. v. Cappellar*, *supra*, said, page 494:

"If the mere word 'debts' (in 2730) had been used, the meaning of the legislature might not be so clear as we think it is now, though the word is one which hardly needs definition. A 'debt' is a sum of money due by certain express agreement. 2 Black's Commentaries 154; 'all that is due a man under any form of obligation or promise,' Bouvier's Law Dictionary, or, if the popular rather than the legal sense is to be taken, 'that which is due from one person to another, whether money, goods or services,' Webster's Dictionary.

"But the legislature, by using the words 'legal,' 'bona fide,' and 'owing,' clearly intended to limit the word 'debts' to such actual, fixed, certain liabilities as, if not due, lack only falling due to be enforceable by action."

In *Insurance Co. v. Cappellar*, *supra*, page 572, it was held that the item returned as "reinsurance" or "unearned premiums" (estimated amount of premiums unearned), was not a "legal *bona fide* debt owing" within the meaning of Rev. Stat. 2730 (Lan. 4033):

"What is the right of the assured under his contract? To have indemnity in case of loss. Nothing more. What is the obligation of the insurer in his contract? To indemnify the assured in case of loss. Nothing more. If no loss occurs during the life of the policy, the assured takes nothing by his contract, and the insurer loses nothing. It is therefore plain, that until a loss occurs, the relation of creditor and debtor does not exist between the parties.

"It is said, that a policy is a 'valuable thing,' before a loss covered by it takes place. How so? Clearly, it does not add to the value of the property insured. It is not a thing valuable in its use. It is not an article valuable in trade. But it is said the holder may, at any time, demand its cancellation and recover the 'unearned premium' so-called. True, the statute secures to the holder such a privilege; but he cannot

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exercise the privilege and hold indemnity also. The object in obtaining insurance is to secure indemnity against loss—not the investment of money; hence the right to demand cancellation, until exercised, is of no taxable value. After the right to demand cancellation is exercised, and the right to indemnity is thereby abandoned, of course the taxable property of the assured is increased, and that of the insurer diminished, to the extent of the premiums returned, or liable to be returned, as above shown.”

True, *Insurance Co. v. Cappellar, supra*, as defendant claims, was a fire insurance case, not life insurance, but I am unable to distinguish in principle the one from the other. The contingencies under which obligations may arise are as uncertain in life as in fire insurance. True, death is certain to occur, and fire may not; but that death or fire may occur during the life of the policy is the uncertainty which makes the principle laid down in the Cappellar case analagous to life insurance also. In *Cincinnati Equit. Ins. Co. v. Gibson, supra*, we have a fire insurance case also. The company was a “mutual.” The insured paid in a certain fixed sum of money and received insurance for seven years. At the expiration of the seven years he was to be permitted to withdraw his deposit subject, however, to “losses and charges.” The deposits thus held by the company were sought to be deducted as “*bona fide* debts owing,” but the court held that these deposits were not debts.

“It may thus happen, said the court, that the losses and charges might consume a part if not all that is paid in and cannot be regarded in the language of the Supreme Court in the Cappellar case as a fixed liability to pay a sum certain, due or to become due, at all events, to some other person or persons.”

So by parity of reasoning not only may there be no debt in the instant case, no obligation, because of the death of the policy holder, or because of a failure of the liability to ripen or accrue during the life of the policy for the reasons already suggested, but, with reference to the endowment feature, the profits and premiums may never equal the face of the policy. The liability under the life rate endowment policies is clearly then, contingent—at best a conditional debt only—and being so, the “accumulated deferred dividends” cannot be held to be a “legal *bona fide* debt owing” within the definition of the adjudicated cases in Ohio.

The auditor, it will be observed, in investigating the returns of the defendant company, for the years in question, ascertained the amount due from credits on account of accumulated deferred dividends on the life rate endowment policies. And thereupon he placed upon the duplicate the amount of credits for taxation equal thereto, but nothing was added on the part of the item, namely, reserve fund or reinsurance fund. So that, even if it had been determined that nothing was due because

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of the deduction of accumulated deferred dividends, if the reserve fund was not a deductible debt the treasurer ought to recover under the item as deducted, because if the reserve fund had not been deducted the company's taxable credits would have been vastly in excess of the amounts placed on the duplicate by the auditor. (For amounts see table, page 20, of stipulation.) *Detroit F. & M. Ins. Co. v. Hartz*, 132 Mich. 518 [94 N. W. Rep. 7].

The question then is, Was the reserve fund a legal *bona fide* debt owing, to be deducted from the credits? The reserve fund may be said to be that part of the assets of an insurance company that the company may not by statute distribute to its stockholders in dividends. It is a fund set apart by law to safeguard the policy holder. Yet it is not the company's obligation, for we have seen there may never be an obligation in the legal sense. It is practically the estimation of the probability that the insurance company may have to pay on the policies taken out. The fact that the directors are forbidden to declare dividends thereon (Rev. Stat. 3602; Lan. 5755), cannot of itself make it a debt due the policy holder. In *Amazon Ins. Co. v. Cappeller*, *supra*, the statute, Rev. Stat. 3648 (Lan. 5859), required a reserve fund for the payment of the policy holders, and the court held that it was not a deductible debt. And the general term having that same case under consideration, speaking of the reserve fund, said, page 494:

"The estimation in money of the chances of their becoming debts does not make them debts in any ordinary sense of the word, any more than the calculation upon the theory or probabilities of how many policy holders may be expected to suffer loss or surrender their policies, changes any particular ones among them from mere policy holders into creditors. The fact remains that none of the losses insured against may ever occur; that none of the outstanding policies may ever be surrendered. So that the proposition counsel for plaintiff must maintain is, that the statute has used the word 'debts' in a sense which includes the estimated probabilities of contingent liabilities becoming fixed."

Kansas Mut. Life Assn. v. Hill, 51 Kan. 636 [33 Pac. Rep. 300], is a case that seems to me to be decisive. The Kansas statute is similar to ours, except that the reserve fund must be deposited with the state treasurer. In this case it was held substantially, that the policies were liable to lapse; that the policy holders may forfeit their rights to participate in the fund by failure to pay; that doubtless many would so fail, and that the contingent liability which was not susceptible of computation was not a debt owing in good faith, to be deducted from credits under the law. At page 649 that court said:

"The ownership of all its assets, of every kind, is in the company alone. It is true that it has contingent liabilities, and is, in a sense, a trustee of the funds in its possession; but the beneficiaries of the trust

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are not yet determined, except as to the ten thousand dollars of losses already accrued. Each and any of the policy holders may forfeit their rights in the fund by failure to pay their assessments, and many of them probably will. A contingent liability, which is not susceptible of computation, is not a debt owing in good faith, which may be deducted from credits under the tax law, and we fail to find anything in the statutes indicating that it was the intention of the legislature that the reserve fund of an insurance company should be exempted."

In *Kenton Ins. Co. v. Covington*, 86 Ky. 213 [5 S. W. Rep. 461], speaking of the reserve fund the court said:

"A taxpayer in listing his property for taxation under the equalization law cannot deduct the contingent liabilities, and in this regard the same rule applies to insurance companies that applies to other taxpayers. Therefore an insurance company in listing its property for taxation cannot have deducted from its assets its contingent liability to policy holders for losses or by reason of their right to reclaim premiums paid in the event of a cancellation of the insurance contract. In this case an insurance company is held liable for taxation upon its reserve fund or unearned premium although as much as this fund amounts to may be required to pay losses for the year."

At page 215 the court says:

"The insurance company asserts an exemption from taxation of its reserved fund, or what is termed unearned premiums, on two grounds."

At page 218:

"The act of March 12, 1870, with reference to the payment of dividends, requiring that no dividends shall be made of this reserved fund, does not divest this corporation of its right of property in it, or to use and invest it for the benefit of the stockholders."

At page 222, the court says:

"The company is the absolute owner, and should be compelled to pay the tax. It may have to pay its entire fund in discharge of its contracts, or the whole of its capital stock, but this affords no reason for the exemption; for, if such a rule is adopted as the basis of taxation in the one case, because experience has demonstrated that a certain amount of loss will be annually sustained, then the same rule must apply to all business enterprises, and the assessing officer is left to speculate on the chance of loss, or the probability of loss, left solely to the judgment of those conducting the business."

See, also, *State v. Parker*, 35 N. J. Law 575; *Sun Mut. Ins. Co. v. New York (Mayor)*, 8 Barb. 450, and *People v. Feitner*, 166 N. Y. 129 [59 N. E. Rep. 731].

Counsel for defendant company, however, insists that said fund is a debt not only because of the language of Rev. Stat. 3602 (Lan. 5755), but also because of the language of Rev. Stat. 3598 (Lan. 5751), Subd. 4.

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This section provides that insurance companies may invest their accumulations, "in loans upon its own policies, not exceeding the reserve or present value thereof computed according to the American experience table of mortality, with interest at 4 per cent, the same being the amount of debts of life insurance companies by reason of their outstanding policies in gross."

We have already seen that a similar argument was disposed of by *Kenton Ins. Co. v. Covington*, *supra*, already referred to, and as the argument of the able counsel for defendant company contemplates an exemption for the benefit of this life insurance company, it is well, inasmuch as exemptions find little favor with the courts, to note in passing that this section is not found in the chapter on taxation, but in the chapter relating to insurance companies and is a provision directing what may be loaned by an insurance company on its policies.

While it is true the obligations of the company on its policies are by this section called "debts," could it have been intended that they were to be considered debts within the meaning of Rev. Stat. 2730 (Lan. 4033)? The statute, it will be observed, does not denominate them "legal *bona fide* debts owing," and although the company's obligation is defined by the policy, as we have already seen, there may in fact never be any ultimate liability on the policy. The obligation of the company being essentially contingent, how can it be metamorphosed by any legislative declaration?

As was urged by counsel for the treasurer, while the legislature may say, that contingent obligations for the purposes of taxation should be considered fixed and legal *bona fide* debts owing, nevertheless the obligation in its nature would still be and remain a contingent obligation. Aside from the grave doubt that the legislature ever intended to create such an exemption, even if it did so intend to exempt an insurance company from taxation on the reserve fund, such statute would be unconstitutional, because violative of the rule requiring uniformity in taxation. Section 2, Art. 12 Ohio Const. It would, in effect, permit insurance companies to deduct contingent liabilities from credits, although other corporations and natural persons are deprived of such a privilege. In other words, its effect would be to impose an unequal burden of taxation, favoring some corporations as against other corporations and individuals. That is prohibited also by Section 4, Art. 13 of the constitution, which provides that the property of corporations now existing or hereafter created shall forever be subject to taxation the same as the property of individuals. As was said by Harmon, J., in *Amazon Ins. Co. v. Cappeller*, *supra*, p. 495:

Undoubtedly "the rule of equality in taxation enjoined by the constitution would be violated if such estimates of contingent obligations were permitted as to corporations when they are not possible as to individuals."

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See also *Exchange Bank v. Hines*, 3 Ohio St. 1; *Standard Life & Acc. Ins. Co. v. Detroit*, 95 Mich. 466 [55 N. W. Rep. 112]; *Evansville Nat. Bank v. Britton*, 105 U. S. 322 [26 L. Ed. 1053].

The defendant's interpretation of Rev. Stat. 3598 (Lan. 5751) would, as we have seen, render that section unconstitutional. Not so, however, the interpretation placed thereon by the court. This being so, the well-established rule of statutory interpretation must govern.

"Whenever a statute is susceptible of two constructions, of which the one would make it unconstitutional, the other constitutional, the latter is to be adopted." Endlich, *Interpretation of Statutes*, Sec. 178, and cases cited.

In view of the foregoing reasons the reserve fund must be held not to be a "legal *bona fide* debt owing" and therefore was not deductible.

While I am cognizant of the fact that there are several cases that hold contrary views to those herein expressed, the principal ones cited, it will be found, cannot be considered in point, for the reason that they turn either, upon the nonforfeitable character of the policies in question, (the obligation or liability thereunder being existent or fixed), or on statutes or state constitutions essentially different from ours.

It appears from the evidence that large sums of money were on deposit to defendant's credit, in three banks of the city of Cincinnati, on the tax days in question. Certain gross amounts were returned by defendant company for taxation. The balance apparently to defendant's credit was reduced or wiped out as defendant claims, and was not returned for taxation, because of an enormous amount of outstanding checks. The defendant's return was based upon its check book, but the treasurer now seeks to tax the actual balances in bank, as shown by the books of the banks, on the day preceding the second Monday in April, in the years in question, without allowing deductions for the outstanding checks, none of which were presented or paid by the local banks until after the tax days of the respective years in question.

The question whether defendant was justified in reducing amounts in bank by deducting therefrom the outstanding checks is dependent for its answer on two other questions: First, were there outstanding checks as a matter of fact? Second, assuming that there were some outstanding checks, as matter of law were such checks properly deductible from defendant's local balances? The "checks" in question fall within four distinct classes, and the stipulation sets out these so-called checks by tables. See pages 11 and 12 of the stipulation.

Table 1. This table represents checks drawn directly on the local banks. These were presented and paid after tax day.

Table 2. Checks drawn on New York banks. These checks were presented and paid after tax day.

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Table 3. Checks on local banks that were never presented or paid but canceled.

Table 4. Checks on New York banks that were never presented nor paid but were canceled.

Let us first consider tables 3 and 4. The evidence shows that these checks as a matter of fact never left the home office of the company. Every definition of a check assumes that it is a promise to somebody, but such pieces of paper were promises to no one. They were never delivered. On the contrary, they were canceled. The defendant, therefore, wrongfully deducted such checks from defendant's taxable deposits. The treasurer is entitled to recover the taxes on the amounts so wrongfully withdrawn from defendant's return, likewise the penalty thereon prescribed by law. I find the amounts thus wrongfully withheld from taxation are as follows:

Year.	Omitted Deposits.
1897	\$ 8,750,
1898	269,850,
1899	5,080,
1900	6,270,
1901	481,220.

Taking up next the checks in table 1: If we assume that these checks were actually issued by defendant company, the evidence shows that they had not been presented and paid on the tax days in question. The question then is, Were defendant's funds in the local banks upon which such checks were drawn subject to the legal demand of defendant company on the tax days in question? "Money" on deposit and subject to demand is taxable. Revised Statutes 2730 (Lan. 4033), reads as follows:

"The term 'money' or 'moneys' shall be held to mean and include every deposit which the person owning, * * * holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand."

The law, therefore, requires that if a person has money on deposit subject to his demand—by that is meant legal demand—he must return the same for taxation. That the money was in the banks is conceded. It is not sufficient, in order to avoid taxation on a bank deposit, merely to issue checks thereon, because a check is nothing more than an order on the fund "payable instantly on demand." It is simply an executory promise to pay the sum specified in the check according to the terms thereof. The mere giving of the check, therefore, is not an assignment *pro tanto* of the fund. It follows, therefore, that until the check is presented or paid or the bank in some way committed to the holder or payee the promise may be recalled. That is to say, the drawer may

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countermand up to the last moment. Up to that time the funds are subject to the drawer's legal demand.

The view thus expressed is in accord with the authorities generally and is fairly deducible from *Kahn v. Walton*, 46 Ohio St. 195 [20 N. E. Rep. 203]; *Covert v. Rhodes*, 48 Ohio St. 66 [27 N. E. Rep. 94]; *Cin. H. & D. Ry. v. Bank*, 54 Ohio St. 60 [42 N. E. Rep. 700; 31 L. R. A. 653; 56 Am. St. Rep. 700]; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 648 [17 Sup. Ct. Rep. 439; 41 L. Ed. 955]; *Bank of Marysville v. Brewing Co.* 50 Ohio St. 151 [33 N. E. Rep. 1054; 40 Am. St. Rep. 660]

These checks, the evidence shows, were given for "collateral loans or expenses." But because given to pay a debt the rule is not altered, nor is the *bona fides* of the transaction involved. A check is subject to countermand before it is presented, or the bank committed to the payee, or before the check is cashed. Now, we know the local banks were in no sense committed to the payment of these particular checks. They were not certified, nor were they presented for payment on or before the tax days in question. In *Ambach v. Sims, Treasurer*, the precise question was determined. In that case Bigger, J., charged the jury as follows:

"Some evidence has been introduced as to certain balances in the bank to the credit of the defendant, but the defendant testified that he had given checks against these amounts. The law in such cases is, that money in bank subject to be drawn out on the check of a person depositing is taxable so long as it remains in bank subject to his order, and the giving of checks unless they were cashed would not exempt it from taxation."

The jury found for defendant. On error the circuit court of Franklin county (Sullivan, Wilson and Summers, JJ.) reversed the judgment but sustained the above charge and in the judgment the court said:

"2. The verdict and judgment below should have been in favor of the plaintiff as to the taxes upon the balances said to have been in bank, subject to the check of the defendant on the dates on which the taxes upon personalty became a lien."

The above case is unreported, but the printed record in the Supreme Court proceedings is before me.

So that, even if the checks were *bona fide* and given for outstanding obligations, it would make no difference, because debts are not deductible from bank deposits. *Payne v. Watterson*, 37 Ohio St. 121. The auditor, therefore, properly added moneys aggregating the amounts of such checks; the deposits were in no sense reduced by such checks. The treasurer is, therefore, entitled to recover the taxes on such omitted amounts and the penalty prescribed by law. For table 1 see stipulation, page 11.

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We come now to consider the checks in table 2. There are two reasons why the alleged outstanding checks in this class cannot be held to have reduced the deposits in the local banks: First, the checks were countermandable precisely as were the checks in table 1; Second, the checks were not "outstanding" as a matter of fact. The authorities referred to, *supra*, under class 1, apply with equal force to the checks of this class, unless it should appear that there was some agreement by which the banks after receiving the printed notice (exhibit M) had in some way, expressly or impliedly, become irrevocably committed to their payment. Was there such an agreement? On page 8 (stipulation) we find:

"There was no agreement between the local banks of deposit and the defendant as to the mode of charging the defendant's deposit on account of these New York drafts, but the practice of the local banks of deposit was to make a book entry charging defendant's deposit account with the draft only when it was reported paid by its New York correspondent."

It is thus apparent that there was no agreement binding the bank as of the time of notice. (Exhibit M.) On the contrary, the evidence shows the defendant's credit was only charged afterwards on payment of the New York draft by the bank. The defendant's credit, or rather its taxable funds *pro tanto* these New York checks, was not charged on the tax days in question on any book of the bank, but defendant company claims that in legal contemplation defendant's account was so charged, and that defendant at the time of the notice (exhibit M) lost the legal control over such funds aggregating the amount of the New York checks, because, it is urged, the agreement of these parties, defendant and the banks, was precisely like—although it lacked the form—a certification by the bank of the checks so drawn; that upon the filing of the printed notice (exhibit M), and the bank's forwarding letter advising payment, the banks were brought into privity. The contention is ingenious but cannot be sustained by the evidence or the law.

If the filing of the printed notice (exhibit M) and the issuing by the local banks of its letter to the New York banks advising payment, was tantamount to certification, the evidence failed to show any state of facts by which it can be successfully maintained that the bank had become irrevocably committed to the payee. If it had been expressly agreed by the local banks and defendant company that its deposits or its "credit" at the local banks were to be immediately charged with the amounts of the checks drawn at the time the banks were notified (exhibit M) and at the time that the local banks advised the New York banks to pay, a different case might have arisen, provided also authority could be produced to show that a bank by prearrangement with its depositor and another bank can "certify" a check of its depositor not on its own

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account but on a bank in which the depositor has no funds; and provided, further, that it could be shown under the evidence that after such "certification" the check came into the control of the payee and that the payee was then and there legally entitled to present such check for payment.

Unfortunately for defendant's theory the evidence leaves no room for legal legerdemain. The sum sought to be taxed was physically in the local banks on the tax days in question. The burden of proof was, therefore, on defendant, to show that these deposits were wiped out legally at least if not actually. If we were to concede for the sake of argument that the transaction in some way rose to the dignity of "certification," the defendant still failed to show that the banks were irrevocably committed to the particular payees of the checks on the tax days in question. The checks were not mailed nor delivered to the payees on or before the said tax days. The defendant company will answer by saying that the financial agent of defendant, to whom the checks were mailed—checks for mortgage loans were never mailed to the payee directly—was by agreement also to be considered the agent of the proposed mortgagor or borrower or payee. The checks obviously could not be in the hands of the drawer or his agent and at the same time in the hands of the payee or his agent. If they were in the hands of the drawer or his agent, they were not "outstanding" checks. If they were in the hands of the payee or his agent, they would be outstanding checks, provided all the conditions to be complied with had been satisfied. The defendant failed to prove that the conditions—upon fulfillment of which defendant's financial agent in his role of agent for defendant was to turn these checks over to himself as the agent of the payee—had been fulfilled.

The entire method of proceeding shows conclusively that the very purpose of sending these checks to defendant's financial agent,—and never to the payee directly,—was to retain control of the same until the liens on the proposed security were wiped out or the title made clear or other conditions satisfied. Certainly the financial agent in his capacity as agent for the borrower or payee, even if he had manual possession of the checks in question, could have no greater legal right to the checks on or before the tax days—if such checks at such times were in his possession—than his principal, the payee, could have had at such particular time. In short the defendant has utterly failed to show that the checks were in the control of the payee's agent or in the control of the payee on the tax days in question. It has failed to prove that the payees' agent or the payees were legally entitled to a single check on said tax days. This being so, what becomes of the claim that the local banks were in privity? What claims did the proposed payees have as against these local banks on or before the tax days in question? Were not such

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deposits still subject to the "latest order" of the drawer of the checks? Were not, in short, the deposits subject to the defendant's legal demand on the tax days in question?

In my judgment these checks were in no sense different in principle from those in class 1. They were countermandable just as we have seen those checks were. The local banks were in no sense committed to the proposed payees at the time the tax lien attached to said funds. There was no certification nor anything equivalent to it. At the very best, the local banks seeking to accommodate a valuable client, instead of certifying, in effect agreed to pledge their own credit to the New York banks, they guaranteeing the New York banks that, if they paid the checks thus drawn on them by defendant company, they, the local banks, would in turn pay them. But such an external promise to pay, if it can even be called such, did not deprive the defendant of legal control over its funds in the banks, nor could it operate to defeat the lien of the state.

If, however, I have erred in these deductions, and it is to be held that the novel practice of these parties was, in effect, a certification and had the effect of a certification, the defendant must still fail because there was no proof that on or before the tax days in question checks were delivered to the payees or their agents and that then and there the payees were legally entitled to them. It follows, therefore, that the deposits withheld from taxation were wrongfully withheld. These moneys then were taxable under Rev. Stat. 2731 (Lan. 4034).

The fundamental rule forbidding duplicate taxation is not violated by the conclusions I have reached, although the defendant company returned as "credits" (mortgage loans) the amounts thus found to be money in bank. Simultaneously with the drawing of the checks the defendant company, it seems, entered upon the mortgage loan register, as completed mortgage loans, the amounts thus checked out. Because the defendant company for its own purposes chose to consider the mortgage loan transaction as completed at that moment, that did not make it a closed transaction; nor could defendant company, by such action, alter the true character of the funds in bank. We have seen that the monies thus withheld from taxation were monies in bank and were subject to taxation. As bank deposits are subject to taxation, they cannot be wiped out with debts, as was sought to be done in the case at bar. *Payne v. Watterson, supra*. Moreover, as the debts exhausted all the "credits" returned by the company because of the wrongful deduction by it of "reinsurance reserve fund and outstanding obligations to policy holders," no tax was paid by this company either directly or indirectly on these amounts in bank. The claim, therefore, is wanting in merit either at law or equity.

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I find that the total amount of bank deposits omitted in the years in question, and upon which the treasurer is entitled to recover is,

1897	.....	\$ 89,200,
1898	.....	349,500,
1899	.....	119,400,
1900	.....	60,800,
1901	.....	674,000.

I find the "credits" omitted in the years in question on which recovery should be had,

1897	.....	\$1,095,700,
1898	.....	823,200,
1899	.....	1,092,100,
1900	.....	1,254,500,
1901	.....	1,259,200.

I find that the total amount of values omitted together with the taxes thereon to be,

Year.	Omitted amounts.	Taxes.
1897	..... \$1,184,900	\$31,020.68,
1898	..... 1,172,200	29,669.31,
1899	..... 1,211,500	31,184.01,
1900	..... 1,315,300	34,171.49,
1901	..... 1,933,200	47,982.02.

In addition to which I find that the treasurer is entitled to recover \$8,701.37, which is 5 per centum allowed by law by virtue of Rev. Stat. 1094 (Lan. 2441).

In view of the foregoing, under the law and the evidence, I find for the plaintiff in the sum of \$182,728.88, and order judgment accordingly.

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ROADS—COUNTY COMMISSIONERS.

[Huron Common Pleas, February 19, 1906.]

*GUY S. NORTH v. HURON CO. (COMRS.).

BUILDER OF ROAD UNDER VOID CONTRACT MAY NOT RECOVER IN EQUITY LOSS AND EXPENSE INCURRED.

Where a person, having in good faith entered into an agreement with a board of county commissioners for the repair of a road by macadamizing, which arrangement does not constitute a valid contract because of the omission of the auditor's certificate, required by Rev. Stat. 2834-b (Lan. 4286), expends the necessary time, money and labor for the proper performance of his attempted contract, he may not recover for the loss so sustained by him in an action in equity to recoup him for his loss and to restore him to his original position. He may not recover anything whatever, either the consideration of the attempted contract, or on a *quantum meruit*, or the amount he has actually expended and thus lost by reason of the oversight of the commissioners.

[Syllabus approved by the court.]

DEMURRER to petition.

B. B. Wickham, for plaintiff.

L. W. Wickham, for defendant.

RICHARDS, J.

This case has been argued to the court upon demurrer to the petition, the demurrer being upon the ground that the petition does not state facts sufficient to constitute a cause of action, in favor of the plaintiff and against the defendant.

The action was brought on January 3, 1906, and is for the purpose of recovering compensation for the construction of a road in Lyme township, Huron county, which is alleged to have been constructed under an agreement with the county commissioners.

The petition alleges in substance that the defendants are the commissioners of Huron county and have authority and power to construct, repair and maintain public roads and that the Hunt's Corners road is a much traveled highway in said county of Huron and runs in an easterly and westerly direction, passing between the village of Monroeville and Hunt's Corners in Lyme township.

The plaintiff alleges that in the spring of 1905, the road became in bad condition and unsuitable for traffic and accordingly in need of repairs and that in March of that year, the board of trustees of Lyme township and the defendant in this action, met at the office of the defendant, the board of county commissioners, to consider the condition of the Hunt's Corners road and decided to repair the road and to put it in suitable condition for traffic by leveling and grading same and placing thereon crushed stone; that the part of said road which the said boards

*Affirmed, North v. Huron Co. (Comrs.) 28 O. C. C. 000.

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thus determined to repair, lay in Lyme township in said county. Then the petition proceeds to allege that a bargain was made by which the trustees of Lyme township were to pay one-half the expense and the commissioners of Huron county were to pay the other half and that the contract was let to the plaintiff in this action; that he proceeded in the summer of 1905, and did the work as he was directed to do and put the road in first class condition, doing the work in a thorough, careful and workman-like manner as contemplated by the parties; and the plaintiff alleges that since July 1, 1905, the road has been in constant use as a public highway of said county and that it is in first-class condition for traffic.

He proceeds further to say in substance that there was no certificate of the county auditor placed on file, showing that the money was in the treasury, authorizing the county commissioners to make this contract, that the money was not in process of collection.

The plaintiff further alleges that he has heretofore done business with these same officers defendant, and in the same manner and had relied upon their statement that they were authorized and empowered to contract and that upon such reliance and upon such previous course of conduct, he was induced to make this contract and did make it without knowing or investigating to ascertain whether the certificate provided or required by law, had in fact been made.

He alleges that the defendant represented to him that it had complied with the law in making said contract and that he relied upon those representations and would not have done so but for the former course of dealing between the parties and that in every case of similar circumstance, he had always received his pay in accordance with the contract upon the completion of the work contracted for.

Plaintiff further alleges that he has expended large sums of money in employing men and teams to do the said work of repair, in purchasing crushed stone and other material and paying freight thereon, has used his own teams and spent his own time and labor, all in carrying out the work of repair of said road.

He alleges that this contract he made is a void contract, in violation of the requirements of the statute restricting the right of the county commissioners to make a contract under those circumstances. Wherefore, he prays that this court may order that a just and true account be taken of all the time, labor, money, material, etc., that the plaintiff has expended in making these repairs as aforesaid, for the use and enjoyment of the defendant, and that this court, on such an account being taken, may order that the expense and loss which has resulted in a benefit and enjoyment to this defendant, may be repaid to him and that this defendant may be compelled to act justly and equitably in the matter

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and prays for any other and further relief to which in equity and good conscience he may be entitled.

I had not supposed, until the elaborate brief was filed by counsel for plaintiff that so much could be said in favor of maintaining this kind of an action. It is fundamental law in Ohio that if county commissioners execute contracts other than in accordance with the restrictions and provisions of the statute, if they violate those provisions, that a contract, as such, is not binding in law.

It will be noticed in this case, from the prayer of the petition and from the allegations of the petition also that the plaintiff is not seeking to recover upon a contract; but he wants the defendant to reimburse him for what he has actually expended in time and money.

The old case,—not so old in point of time, but old because it has been so many times used since its decision,—of *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 [54 N. E. Rep. 372], is pretty near the polar star in this state for determining the rights and liabilities of county commissioners in this kind of work. The syllabus in that case is extremely broad:

“A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party.”

Notice that the court in this case condemns not only the action upon the contract itself, but it expressly declares it to be void, and denies the right to recover upon what lawyers call a *quantum meruit*; it denies the right to recover the reasonable value of what has been furnished or supplied.

Further along in this case, the court use language that is well worth being heeded, page 419:

“Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and if executed on one side, no recovery can be had against the party of the other side.”

They say further on page 425:

“The statutes are notice to the world as to the extent of the powers of the commissioners, and the bridge company is bound by that notice.

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It knew, and was bound to know, that the commissioners had no power thus to enter into a contract, and that a contract thus attempted to be entered into would be null and void and would not bind either party."

The court further say, page 426:

"The amended petition pleads an express contract, and where there is a subsisting express contract the recovery must be had thereon, and an action cannot be had in such case upon an implied contract."

" * * * To say that the commissioners accepted the bridge, and retained it, and promised to pay what it is reasonably worth does not aid the plaintiff. The commissioners cannot purchase supplies upon the reasonably-worth plan, and no one is permitted to deal with them on that plan. The statute is the only authority and guide for both parties. In this case both parties have acted in disregard of the statute, and the court will leave them where they have placed themselves, and refuse to aid either."

Now, my attention has been called to the fact that since the decision of that case, a statute has been passed authorizing parties under certain circumstances, where money has been unlawfully and improperly expended by public authorities, to bring an action to recover it back; but that statute could be of no aid to the plaintiff in this case. It, in fact, if it has any application at all, would bear the other way, because it simply emphasizes the fact that if the commissioners should unlawfully disburse money, some one would have a right to compel them to refund it, and how that could aid the plaintiff in this action, I am unable to see.

The decision which I have just quoted from, condemns, as I have before said, not only an action to recover on the contract itself, but an action to recover upon the reasonable value of what was furnished. It is claimed in argument by counsel for plaintiff in this case, that this action is neither one of those. He admits the binding effect of the decision, from which quotation has just been made, but seeks to avoid it in the petition; in fact, in the argument upon the demurrer, it was claimed that this action is not purely upon contract, which is manifestly true, and also that it is not to recover the reasonable value.

The plaintiff wants the defendant to reimburse him for what he has actually expended in time and money. Now, it is a little difficult for the court to see the difference between a recovery sought upon that ground, and the one which seeks to recover for reasonable worth, for what has been furnished. The reason of the decision in *Buchanan Bridge Co. v. Campbell, supra*, the reason of that part of the decision which forbids the recovery upon the reasonably worth plan is, that if such recovery were allowed, it would authorize and permit the evasion of the statute in every case. The statute in this case, undoubtedly may work an injustice to this plaintiff and undoubtedly there are many cases where the statute will work an injustice to persons who have actually, in good faith, fur-

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nished material and labor for public officers; but the statute is for the protection of the public, and within the assumed knowledge of everybody, and everybody is bound to know that the statute prohibits county commissioners from contracting unless they comply with the provisions and requirements of the statute. If courts should permit the evasion of the statute, it would lead to disastrous results as it would in effect repeal the statute itself, I have no doubt, in many cases. Whether the statute is wise or unwise, the legislature has adopted it and we are bound to follow it.

Now, to say that we recognize the distinction urged by counsel for plaintiff,—if we were able to recognize it and authorize a recovery in this case for what he seeks to recover, if he stamps it as a different kind of action from one to recover on the reasonably-worth plan, it would still be, if different, an evasion of the statute and I am not able to see that it can be justified in law. I should be glad if the law would authorize the recovery to this plaintiff, but I am not able to see, under the law, how he can recover in this action. Now, we are not wholly without authority. In *Lee v. Monroe Co. (Comrs.)* 14 O. F. D. 43 [114 Fed. Rep. 744; 52 C. C. A. 376], where commissioners of a county representing that they had complied with the law and had a right so to do, purchased a bridge and issued orders for the payment therefor, but the payment of such orders was enjoined because the law had not been complied with and it was decided that the holder of such an order may maintain an action for authority to remove such bridge, unless the county pays therefor.

Many cases have been cited by counsel for plaintiff, which say in effect that the defendants must either make compensation, or else they must make restitution and he argues from that, that the plaintiff has the option of compelling either restitution or compensation, as the plaintiff sees fit.

I do not so interpret those cases, and the case just cited is one of them. It announced the doctrine that if compensation is not made restitution will be ordered by the court, upon the tender, of course, of what has been furnished,—what has been paid upon the contract. The decree in that case is for the restitution to the plaintiff, entitling him to take the bridge back; the decree in the case at bar, would be, if the cases were parallel, that the plaintiff might take back his road, but of course, that would be inadequate—that would be no compensation—no just nor fair right to him in this case, because a large part of it is the value of the labor that he has put into it. The crushed stone itself would be of trifling value compared with the labor of taking it and placing it and putting it in form and shape and making the road fit.

But the remedy that was awarded in *Lee v. Monroe Co. (Comrs.)*, *supra*, was an order that the bridge might be removed, not an order

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compelling compensation, either on the reasonably-worth plan, or upon the contract plan, or any other plan. It recognized the fact that the contract was unlawful and was void, giving no rights, and of course, if the contract was void, then the thing alleged to be sold, was not sold. It was still the property of the bridge company in that case, and in the case at bar, it would still be the property of Mr. North—an unfortunate thing for him—as the restitution of the road merely would be wholly inadequate for him.

This case was cited and approved by Judge Wildman in a case decided in Sandusky county last year and was much discussed by him and its force and effect recognized. In that case, a decree was denied to plaintiff largely because there had been no tender made by the plaintiff. In this case there is no known rule of law, at least no rule of law known to this court that would authorize a decree in favor of the plaintiff for an accounting and it will therefore be ordered that the demurrer to the petition be sustained.

EMBEZZLEMENT—CRIMINAL LAW.

[Lorain Common Pleas, May 8, 1906.]

*STATE OF OHIO V. H. H. FORBES ET AL.

AVERMENT INSUFFICIENTLY ALLEGING OWNERSHIP OF PROPERTY EMBEZZLED.

Funds were bequeathed as follows, to wit: "All the rest and residue of my estate, I give, devise and bequeath to the directors in trust and their successors in office of the Lorain county infirmary, to be used by them to the best interests in caring for the poor and inmates of said infirmary:" *Held*, that said funds did not become the property of Lorain county, and that an indictment which set forth the above bequest, and charged the infirmary directors with embezzlement of said funds as funds of Lorain county, did not properly allege ownership of the property, and that a demurrer to such indictment should be sustained.

[Syllabus by the court.]

F. M. Stevens, prosecuting attorney, for plaintiff.

Q. A. Gillmore, A. E. Lawrence and Chamberlain & Hamlin, for defendants.

WASHBURN, J.

In these indictments the defendants [H. H. Forbes and N. C. Prindle] are indicted for converting to their own use \$100 of a certain fund, which all of the counts in the indictments' charge was the property of Lorain county.

There are thirteen counts in all in both indictments; but they all refer to the same \$100—the offense being charged in different ways. In

*Within thirty days after the rendition of the above decision, the case was taken to the Supreme Court on exceptions by the prosecuting attorney, and upon hearing, the Supreme Court refused leave to file petition in error.

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ten of the thirteen counts the fund is charged as being the property of Lorain county, by virtue of a bequest, which was in the words and figures following, to wit:

(10) "All the rest and residue of my estate, I give, devise and bequeath to the directors in trust and their successors in office of the Lorain county infirmary, to be used by them to the best interests in caring for the poor and inmates of said infirmary."

The other three counts of the indictment charge said fund as being the property of Lorain county; but do not set forth how it became the property of Lorain county, whether by taxation, by bequest or otherwise.

The matter is submitted to the court upon a demurrer to each count of the indictment.

"An indictment or information for embezzlement must show the ownership of the property alleged to have been embezzled with the same particularity as in a prosecution for larceny." 15 Cyc. 517.

"Ownership must be alleged, and with the same accuracy and after the same rules, as a common-law larceny." 2 Bishop, New Cr. Proceed. Sec. 320.

In *Brown v. State*, 18 Ohio St. 496, 497, referring to the law of Ohio in reference to embezzlement, the court say:

"In an indictment under that act, it is sufficient to allege that the money embezzled was public money, belonging to the several municipalities named in the act, or to one or more of them, without stating the respective amounts belonging to each."

Thus recognizing the principle as laid down in the authorities cited above, that in an indictment for embezzlement the ownership of the thing embezzled must be set out in the indictment.

Now as I have said, in all of the counts of these indictments, the property is alleged to be the property of Lorain county, and in ten of them the bequest by which it is claimed the ownership of the fund is shown to be in the county of Lorain is set out.

It is claimed on the part of the defendants that this bequest, which is set forth in the indictment, establishes the fact as a matter of law, that the property claimed to have been embezzled was not the property of Lorain county.

It is claimed by the defendants and is conceded by the prosecuting attorney, that there is no law in the state of Ohio, which enables the board of infirmary directors to accept a bequest like this on behalf of the public; of course they may accept it as individuals the same as any other individual might accept such a trust.

As bearing upon whether this is the property of Lorain county, the case of *Scott v. Marion Tp. (Tr.)* 39 Ohio St. 153, is very important. That was a devise to the trustees of Marion township, Allen county, Ohio. And the law was then and is now, that the trustees of a township have

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authority to receive such bequests for the benefit of the poor; but the bequest in that case was not to the township; it was "to the trustees of Marion township, and their successors perpetually, for the exclusive benefit of the poor of the township."

And they were given authority to manage the trust, "as they think best for the benefit of said poor."

And it was held in that case, notwithstanding the fact that the trustees had authority to receive such a bequest, that it did not become the property of the township, but was to be held by the trustees, and managed by them as they should think best for the benefit of the poor.

If it had been devised to the township then it would have been township property, and the trustees would have had to handle the property under the law governing the property of the township, and in that event they could have loaned it out only upon mortgage security; they did loan it out without taking mortgage security, and the Supreme Court held that they had the authority to do so, because they took it as trustees and not as the property of the county.

If the trustees of the township in that case under that devise, when the law gave them authority to receive the property as property of the township, did not take it as such, it would seem to follow that in the case at bar, where the directors of the infirmary are not authorized by law to receive the property in question as the property of Lorain county, and where they are not named in the will by their official title, the property in question was not the property of Lorain county, but was held by the directors, as trustees, to administer a charitable trust in accordance with the terms of the will creating such trust.

There is nothing in the will which says that the property in question was given to Lorain county, and there is no law permitting the infirmary directors as a board to take such property for Lorain county, even if such was the intention of the person who made the will.

The directors held the money as trustees, to use, not for the benefit of Lorain county, but for the benefit of the inmates of the infirmary, to provide said inmates with luxuries and things not furnished by the county, and not for the purpose of relieving the county of responsibility in the discharge of its duty to such inmates. It would have made no difference to Lorain county if the fund had been left to the president of the national bank and his successors in office to administer; in that event the county would not have owned it.

If it was owned by Lorain county it should have been in the treasury of Lorain county. The infirmary directors had no authority to deposit in the bank money belonging to Lorain county; the treasury is the place provided by law for the deposit of the money of the county.

So it seems very plain to me that in ten counts of these indictments, they show upon their face that as a matter of law this property did not

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belong to Lorain county, and thus the allegation in those counts that the property belonged to Lorain county is nullified, and those counts are left the same as if no allegation of ownership was contained therein, and in that event they fail to state one of the essential things that should be stated in an indictment for embezzlement. And the demurrer to them should be sustained.

The demurrer will therefore be sustained on the ground indicated as to counts one and two in case number 2961, and as to counts one, two, three, four, five, six, seven and eight in the indictment number 2962.

In the first count of the indictment under 2961 and in the first, second, third, fourth and eighth counts of indictment number 2962 the allegation is, that the fund embezzled was public property, the defendants "being charged" as public officers "with the receipt, safekeeping and disbursement" thereof.

These counts are all drawn under Rev. Stat. 6841 (Lan. 10448), which applies only to public funds; all these counts showing on their face that the funds in question are not public funds, the demurrer as to those counts will be sustained also, on the ground that the defendants were not charged as public officers with the receipt, safekeeping and disbursement of said fund.

The three last counts of indictment number 2962 does not, as I have stated, set forth how said fund became the property of Lorain county; but simply alleges that it is the property of Lorain county.

The court cannot say on demurrer that the allegation in these three counts is untrue, and as the defendant, Forbes, in these three counts is charged with embezzlement as clerk, agent, employe and servant of the board of infirmary directors, and is charged with having converted to his own use money coming into his hands by virtue of his employment, these counts charge a crime under Rev Stat. 6842 (Lan. 10449), and the demurrer to them will be overruled.

ACTIONS—COURTS—PLEADING.

[Superior Court of Cincinnati, Special Term, January 19, 1906.]

SECURITY INS. CO. V. HARRY H. MICHAEL ET AL.**1. EQUITY JURISDICTION—FRAUDULENT AWARD.**

Where a petition has, as its object, the bringing under judicial inquiry of fraudulent acts rendering void an award or finding regular on its face, and to annul and set aside the award is a vital condition with reference to legal rights depending upon it, a case of equitable jurisdiction is clearly presented.

2. PLEADING—JOINDER OF PARTIES—JOINT CONTRIBUTORS ON FRAUDULENT AWARD PROPER PARTIES PLAINTIFF.

If the effect of an award, if valid, is to fix a basis upon which several parties are to be made contributors, they are all parties in interest in the relief sought, and the same reasons which justify the joining of any two of them as plaintiffs require the joining of all.

Superior Court of Cincinnati.

3. PLEADING—PARTIES PLAINTIFF CANNOT COME IN BY CROSS PETITION—DEFECT OF PARTIES REACHED BY DEMURRER FOR MISJOINDER—PLAINTIFFS JOINED AS DEFENDANTS NOT REACHED BY DEMURRER.

Where the award of the amount of loss to be borne by joint insurers has been made and is attacked in equity on the ground of fraud, two of the insurers joining in the petition, and the others consenting to the action and coming in by cross petition, a demurrer on grounds of misjoinder of parties plaintiff, searching the record, will be sustained for defect of parties plaintiff, as the cross-petitioning defendants consenting to the action are proper parties plaintiff and not proper parties defendant. Demurrer to the cross petitions for misjoinder will be overruled as, such parties not being real defendants, they should be reached by motion to strike from the files.

[Syllabus approved by the court.]

DEMURRER to petition.

Cabell & Kohl, for plaintiff.

The award being regular on its face, equity alone can entertain a defense of fraud, and there is no adequate remedy at law. *Pomeroy*, Eq. Jurisp. Secs. 176, 919; *Hartford Fire Ins. Co. v. Mercantile Co.* 44 Fed. Rep. 151; *Day v. Hammond*, 57 N. Y. 479 [15 Am. Rep. 522]; *Home Ins. Co. v. Stanchfield*, 1 Dill. 424 [12 Fed. Cas. 449]; *Ryder v. Jenny*, 2 Robt. (N. Y.) 56; *North British Mer. Ins. Co. v. Lathrop*, 70 Fed. Rep. 429 [17 C. C. A. 175; 25 U. S. App. 443]; *Chicago v. Collins*, 175 Ill. 445 [51 N. E. Rep. 907; 49 L. R. A. 408; 67 Am. St. Rep. 224]; *Wilkie v. Chicago*, 188 Ill. 444 [58 N. E. Rep. 1004; 80 Am. St. Rep. 182].

The annulment or cancellation of a written agreement being prayed for, a court of equity has exclusive jurisdiction and there is no adequate remedy at law. *Pomeroy*, Eq. Jurisp. Secs. 140, 1377.

The jurisdiction of the superior court sitting as a court of chancery, to entertain a petition of the nature of the one filed herein, may also be grounded upon the prevention of a multiplicity of suits, and the question of contribution which necessarily arises in this case by virtue of the policy provision requiring the several companies to *pro rate* the amount of loss in proportion to the amount of their respective policies. *Falls of Neuse Mfg. Co. v. Insurance Co.* 26 Fed. Rep. 1; *Tisdale v. Insurance Co.* 36 So. Rep. 568 (Miss.); *American Cent. Ins. Co. v. Landau*, 56 N. J. Eq. 573 [39 Atl. Rep. 400]; *Virginia-Carolina Chemical Co. v. Insurance Co.* 113 Fed. Rep. 1 [51 C. C. A. 21]; *Rochester German Ins. Co. v. Schmidt*, 126 Fed. Rep. 998; *Home Ins. Co. v. Chemical Co.* 109 Fed. Rep. 681; *Fuller v. Insurance Co.* 36 Fed. Rep. 469; *Garrison v. Insurance Co.* 60 U. S. (19 How.) 312 [15 L. Ed. 656]; *Catlett v. Dougherty*, 114 Ill. 568 [2 N. E. Rep. 669]; *Craft v. Thompson*, 51 N. H. 536; *Algona Tp. v. Pott's Creek Tp.* 54 Iowa 286 [6 N. W. Rep. 295].

Connor, Walker & Sparrow, for defendants in error.

HOSEA, J.

Suit is by two of six insurance companies—the other four being made defendants—against the defendant firm, seeking to set aside an

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appraisement, award or finding of the amount of loss alleged to be incorrect, excessive and unjust through and by reason of fraudulent acts and fraudulent misrepresentations of the insured in and during the appraisement proceedings, which acts and misrepresentations are claimed to render the policies void.

It appears, inferentially at least, that the award was upon a joint submission in that behalf by all the companies concerned; and the four companies—or three of them—appear, represented by counsel for plaintiffs and file cross petitions following, *in totidem verbis*, the averments of the petition and asking independently the same relief.

The petition is demurred to (1) for want of jurisdiction as to subject-matter; (2) misjoinder of parties plaintiff; (3) same, as to defendants; and (4) want of facts sufficient, etc.; and the cross petitions are also demurred to.

If, as I apprehend, the grounds stated all involve as a fundamental proposition the objection to the jurisdiction of equity in the premises, I think the demurrer is not well taken. It is fairly clear from the petition that the object is to bring under judicial inquiry fraudulent acts rendering voidable an award or finding regular on its face; and to invoke powers peculiar to equity—should the facts be found as alleged—to annul and set aside this award which is a vital condition as to legal rights depending upon it. In such a case the equitable jurisdiction of the court is clear beyond question and the demurrer as to the first ground must be overruled.

But it also appears that the award is the result of the joint and concurrent act of all the insurers; and its effect, if valid, is to fix a basis upon which all are to be made contributors, in proportion, to make good a common loss. All are therefore parties in interest, by virtue of this joint relationship to the award, in the relief sought to be obtained, namely, the annulment of the award as a condition of their liability. The same reasons that justify the joining of two as plaintiffs require the joining of all.

As the demurrer is said to search the record, it is sustainable upon the ground of defect of parties plaintiff, rather than misjoinder. Revised Statutes 5005 (Lan. 8520), requires parties joined in interest to be plaintiffs, except where they refuse to join, in which event, upon proper allegations they may be made defendants. Revised Statutes 5007 (Lan. 8522). But this was not done. The status here clearly shows that the cross petitioners in fact consent and should be joint plaintiffs in the petition. As *cross petitioners* they are not properly in the case and the cross petitions are subject to be stricken from the files but are not open to demurrer since it is not, properly speaking, a misjoinder as to them, not being real defendants.

For the reasons given the demurrers will be sustained in part, as

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to the petition; and overruled in part, with leave to amend petition in—days; and overruled as to cross petitions. But, as the situation requires a redrafting of the petition to include the cross petitioners as plaintiffs, it is suggested that a more complete, succinct and exact averment of facts is desirable, showing more clearly the grounds of joint equitable relief and an appropriate prayer that the court may take cognizance of the matter and determine it as an entirety according to the facts as they may be found upon final hearing, the plaintiffs submitting themselves to the jurisdiction for this purpose upon the theory that a court of equity having taken jurisdiction for one purpose will retain the cause and administer full relief in the premises.

Demurrer sustained with leave to amend in—days.

OFFICE AND OFFICERS—SURETIES.

[Hamilton Common Pleas, July 1, 1903.]

*STATE OF OHIO V. FRANK COTTLE, ADMR.

1. CLERK OF BOARD OF EDUCATION MAY NOT LAWFULLY RECEIVE MONEY.

The clerk of a board of education of a school district is without authority to, and may not, lawfully, receive any money, that duty being solely that of the treasurer of the board. The board is without authority to authorize him to receive money by resolution.

2. SURETIES ON BOND OF CLERK OF BOARD OF EDUCATION NOT LIABLE FOR MONEYS APPROPRIATED BY HIM IF RECEIVED BY HIM WITHOUT LEGAL AUTHORITY.

Where a clerk of a board of education, by virtue of a resolution of the board, receives money paid as tuition by nonresident pupils and converts it to his own use, the sureties on his official bond cannot be held responsible for his defalcation, as they must respond only for his failure to perform his legal duties.

[Syllabus approved by the court.]

C. J. Hunt, city solicitor, for plaintiff.

Harrison & Aston and F. J. Dinsmore, for defendant.

SPIEGEL, J.

The second amended petition in this cause [State of Ohio v. Frank Cottle, Admr. of George R. Griffiths et al.] alleges the election of George R. Griffiths as clerk of the board of education of the school district of Cincinnati for three years from April 16, 1900; that he filled said office from that date until his death, October 1, 1900; that he gave a bond in the sum of \$5,000, conditioned upon the faithful performance of all the official duties required of him as clerk of said board, and that he collected under a rule of said board, ordering him to collect tuition fees from nonresident pupils, the sum of \$4,757.23, which he embezzled, for which sum the plaintiff asks judgment against the bondsmen.

*Affirmed, State v. Cottle 28 O. C. C. 000; State v. Griffith, 74 Ohio St. 80

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Hereto one of the bondsmen, William Griffiths, demurs, because said petition does not state facts sufficient to constitute a cause of action against him.

The determination of this demurrer depends upon the question whether it was a proper official duty of the clerk, by order of the board, to collect said tuition fees and account for them to the board of education, or whether it was the duty of the treasurer of the board of education to collect said fees on the order of the clerk, and account for them to the board; for the rule laid down in *Mechem*, Pub. Off. Sec. 282, governs the liability of official bondsmen:

"The contract of sureties upon an official bond is subject only to the strictest interpretation. They undertake, in the language of Judge Cooley, 'for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent.'"

It would be idle to multiply decisions from every state of the Union in favor of this rule of law. Our own Supreme Court has spoken upon this matter. In *McGovern v. State*, 20 Ohio 93, Judge Ranney, in citing *State v. Medary*, 17 Ohio 565, thus forcibly reiterates the rule:

"The bond speaks for itself, and the law is, that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way in order that it may prevail."

In *Greenville v. Anderson*, 58 Ohio St. 463 [51 N. E. Rep. 41], where the Supreme Court holds the bondsmen of the defendant as city clerk liable for his malfeasance, the court finds it to have been one of the official duties of the clerk, imposed upon him by statute, to draw warrants upon the city treasurer for claims allowed by council, and the fraudulent raising of said vouchers and appropriating said accounts, to have been done by him while within the exercise of his official duty. As the court says, page 477:

"It is argued in support of the demurrers, that the grounds of complaint made in the petition are the alleged failures of Elliott, the defending city clerk, to account properly for and pay over the moneys he wrongfully obtained from the treasury, which, it is urged, were his individual delinquencies, and not official defaults for which his sureties are answerable, because neither the receipt nor disbursement of the moneys pertained to his office. And cases are cited which hold that sureties on official bonds, conditioned that the principal should faith-

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fully account for and pay over all moneys received by him, are not liable for any misappropriation of money which came to his hands otherwise than by virtue of his office. The principle is elementary. The obligation of sureties must be found in the instrument by which they are bound, and cannot be enlarged beyond its terms. But there was no failure of Elliott to account for and pay over the moneys he wrongfully received, except his failure to cover them back into the treasury. His wrong was in the means employed to obtain the money; and while these were violations of law, they were nevertheless official acts."

The last case upon this subject-matter is found in *State v. Carter*, 67 Ohio St. 422, 423 [66 N. E. Rep. 537], wherein the Supreme Court holds that a clerk who collects sewer assessments under an ordinance of council, whether valid or invalid, stands legally charged with such frauds within the meaning of the statute defining embezzlement, and if he fraudulently converts the same to his own use, he is guilty of embezzlement; but, adds the court, page 440:

"We do not have the question of liability of the sureties on the bond of the clerk, for moneys collected under an ordinance passed either before or after the execution of the bond, and in what has been said in this opinion we do not pass on such probable or possible question."

Coming now to examine whether the collection of these tuition fees was a proper exercise of official duty on the part of the clerk of the board of education, the statutes of our state must determine this question, for the board is entirely a creature of statute, and its powers and duties are prescribed thereby. No section of the Revised Statutes of Ohio authorizes the clerk to act as financial officer of a city school district; but, on the contrary, Rev. Stat. 4042 (Lan. 6634) provides distinctly that "in each city district the treasurer of the city funds shall be ex-officio treasurer of the school funds." Revised Statutes 4013 (Lan. 6572) prescribes that,

"Each board of education may admit other persons upon such terms or upon payment of such tuition as it may prescribe, and the several boards may make such assignment of the youth of their respective districts to the school established by them as will, in their opinion, best promote the interests of education in their districts."

It is to be presumed that the board of education passed the rule authorizing the clerk to collect tuition fees and account for them to the board under the statute. But, if so, this action is directly contrary to Rev. Stat. 4047 (Lan. 6638), which provides that,

"No treasurer of a school district, except in cases otherwise provided for in this title, shall pay out any school money except on an order signed by the president and countersigned by the clerk of the board of education; and no money shall be paid to the treasurer of a

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district, other than that received from the county treasurer, except upon the order of the clerk of the board, who shall report the amount of such miscellaneous receipts to the county auditor each year, immediately preceding such treasurer's settlement with the auditor."

This section does not authorize the clerk to receive any miscellaneous moneys; on the contrary, upon his order they must be paid directly to the treasurer. The clerk is simply made the auditing officer, to keep a check upon the treasurer, and the rule of the board of education, ordering the payment of the tuition fees, or any other moneys to the clerk, is clearly invalid and void. That this is the clear intent of our laws upon this subject is further shown by Rev. Stat 4055 (Lan. 6646), defining the method of keeping accounts by the treasurer and clerk of a school district, namely:

"The auditor of each county shall furnish to the clerk and treasurer of each school district in his county a suitable blank book, made according to the form prescribed by the commissioner of common schools, in which each shall keep an account of the school funds of his district; the clerk's account shall show the amounts certified by the county auditor to be due the district, all sums paid to the treasurer from other sources on his order, and all orders drawn by him on the treasurer, and upon what funds and for what purpose drawn; the treasurer's accounts shall show the amounts received from the county treasurer, all sums received from other sources on the order of the clerk, and the amounts paid out, and from what funds and for what purposes paid; and a separate account of each fund shall be kept, and each account shall be balanced at the close of the school year, and the balance in the treasurer's hands belonging to each fund shown."

It will thus be seen by these sections that there is no authority given to the clerk by statute to receive or disburse any money, but the contrary intent is clearly evinced, especially when examined in connection with the statutes prescribing the duties of the treasurer. The clerk is but the bookkeeper of the board of education, having charge of its records and accounts. No rule of the board of education can change the statutory law of the state, which required tuition fees to be paid directly to the treasurer of the board upon the order of the clerk. The law is well settled upon this point, and among the great number of cases cited to me, I will only quote the syllabus in *People v. Pennock*, 60 N. Y. 421:

"The sureties upon the bond of a supervisor, containing the usual condition that he will 'account for all moneys belonging to the town coming into his hands as such supervisor,' are only liable for moneys which their principal is authorized and bound by law to receive in his official capacity as disbursing agent for the town; not for that of which he becomes the voluntary custodian, or which is ordered by the board of supervisors, without authority of law, to be paid to him.

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"It is the duty of boards of supervisors to require moneys raised by tax for relief of the poor of towns, and for highway purposes, to be paid over direct to the overseers of the poor * * * and to the commissioners of highways respectively. * * * A supervisor as such has no authority to receive such moneys, even in transit.

"Accordingly held, where a town collector, in compliance with directions contained in this warrant, paid over to the supervisor the moneys collected for the purposes above specified, that the sureties upon the bond of the supervisor were not liable thereon because of his appropriation to his own use of the moneys so received."

Attention is also called to *Hartford Tp. (Bd. of Ed.) v. Thompson*, 33 Ohio St. 321, wherein our Supreme Court released the sureties of the treasurer of the board by reason of the illegality of the action of the board.

Following the rule of *stare decisis*, as maintained by our Supreme Court in *State v. Carter*, 67 Ohio St. 422, 440 [66 N. E. Rep. 537; 93 Am. St. Rep. 1689], the demurrer must be sustained.

Insurance Co. v. Railway.

INSURANCE—NEGLIGENCE:

[Franklin Common Pleas, April 17, 1906.]

HOME INS. CO. v. PITTSBURGH, C. C. & ST. L. RY.

1. ACTION BY INSURER TO RECOVER FOR LOSS OCCASIONED BY DEFENDANT'S NEGLIGENCE SHOULD AVER THAT INSURED PERFORMED ALL CONDITIONS.

In an action brought by a fire insurance company to recover for money paid to an insured on account of a loss occasioned by defendant's alleged negligence, an averment in the petition that the insured had performed all the conditions of the contract of insurance on his part to be performed is a necessary and proper averment to show that plaintiff's payment was not voluntary but compulsory.

2. NEGLIGENCE—CONCURRENT CAUSES MAY ALL BE ALLEGED AND PROVED.

Where an injury is caused by more than one act of negligence on the part of the defendant, plaintiff may allege and prove all such acts.

[Syllabus approved by the court.]

J. W. Mooney, for plaintiff:

Memoranda of authorities of plaintiff against motion filed by defendant. Rev. Stat. 3324 (Lan. 5288); *Lake Erie & W. Ry. v. Falk*, 62 Ohio St. 297 [56 N. E. Rep. 1020]. Clement, Insurance 369, rule 19. *Wunderlich v. Railway*, 93 Wis. 132 [66 N. W. Rep. 1144]; *Swarthout v. Railway*, 49 Wis. 625 [6 N. W. Rep. 314]; *Piatt v. Radford*, 52 Wis. 114 [8 N. W. Rep. 606]; *Omaha & R. V. Ry. v. Insurance Co.* 53 Neb. 514 [73 N. W. Rep. 950]; *State Ins. Co. v. Railway & Nav. Co.* 20 Ore. 563 [26 Pac. Rep. 838]; *Home Mut. Ins. Co. v. Railway & Nav. Co.* 20 Ore. 569 [26 Pac. Rep. 857; 23 Am. St. Rep. 151]; *Atchison, T. & S. F. Ry. v. Insurance Co.* 59 Kan. 432 [53 Pac. Rep. 459]; *Marine Ins. Co. v. Railway*, 41 Fed. Rep. 643.

Reply of plaintiff to additional memoranda in support of motion. Rev. Stat. 5005, 5007 (R. S. 8520, 8522).

Henderson, Livesay & Burr, for defendant.

BIGGER, J.

This is an action brought by the Home Insurance Company to recover from the defendant, the Pittsburgh, C. C. & St. L. Railway Company, for a fire loss paid by the plaintiff company to one Malissa Slain, for the loss by fire of a house adjoining the tracks of the defendant company in Montgomery county, this state, and which fire, it is alleged, was caused by the negligent acts of the defendant company, which are set forth in the petition. In substance the claim is that the company was negligent in maintaining an insecure railway crossing opposite the house in question, and that as one, Babbitt, was crossing the railway track with an oil wagon and was upon said crossing, his wagon wheel became fastened between the rail and the plank by reason of the distance

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being too great between said rail and plank, and that while thus fastened upon the track an engine, in charge of an engineer in the defendant's employment, approached and negligently ran into the wagon, throwing its contents over the house which, becoming ignited from the fire in the engine, resulted in the total destruction of the house.

The defendant has interposed a motion asking that certain averments in the petition be stricken out as irrelevant and redundant. First, it is asked that the averment, that the owner of the house had complied with all the terms and conditions of the insurance policy upon her part to be performed, be stricken out. This is clearly material because it is necessary for the plaintiff to allege and prove that the payment was not a voluntary payment, and that it was under legal compulsion to pay. Counsel for defendant seemed to admit in the reply memorandum that this may be necessary, but says it should be averred in issuable form, to wit, that the plaintiff was obliged to pay, etc. But that would only be a conclusion of the pleader. The fact that she complied with all the terms and conditions of her contract, and that there was a loss by fire, and that plaintiff paid it, is the proper averment.

Defenses two and three of the motion ask that the averments concerning the negligence of the defendant in maintaining a crossing be stricken out. The claim upon this point is that the negligence of the defendant, if there be any, was that of the engineer in not bringing his train to a stop. But plaintiff is not compelled to rely upon one act of negligence of the defendant alone. If more than one act of negligence on the part of the defendant concurred in causing an injury, the plaintiff may allege such concurring acts of negligence. It is a familiar principle in the law of negligence, that where an injury results from the concurrence of two causes, for one of which the defendant is responsible, but not for the other, the defendant cannot escape liability. It is equally true that if the defendant is responsible for each of which, the defendant is liable.

"Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences may be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer." Black, on the law and practice in accident cases and cases cited.

If the crossing had not been negligently maintained so as to entrap the wagon, the engine could not have done any injury, even if the engineer was not looking. On the other hand the negligence at the crossing causing the wagon to be fastened might not have caused an injury, if the engineer had been exercising proper care. But where the defendant was responsible legally for both negligent acts, and they unite in causing the injury, there is no doubt about the right of the

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person injured to allege and prove both, if he can. It is not a question of proximate or remote cause, but a question of concurrence of causes, for both of which the defendant is responsible.

Branches four, five, six, seven and eight are treated together in the brief of defendant's counsel, and it is claimed they should not be stricken out as evidential matter. Most of this matter has relation to the conduct of said Babbitt after his wagon became fastened on the track, and it is said this is purely evidential. Counsel have not argued the question as to whether or not it is necessary for the plaintiff to allege and prove facts showing that Babbitt was not guilty of contributory negligence. If it is, then the pleader ought to state the facts as to his conduct—that is what he did, and not the conclusion of the pleader that he was free from contributory negligence. But if this is not necessary, still these are facts which I think it proper to plead upon the question of negligence of the engineer himself.

An engineer who sees a wagon approaching or upon a railroad crossing, has ordinarily a right to assume that the wagon will move on across, and out of harm's way, and although he might see it plainly for a long distance, as is here stated, it was possible to do in this case, yet he would not ordinarily be negligent for not bringing his engine at once under control, but if the wagon be fastened upon the track and the driver be running towards the engine, as is alleged here, and flagging the engine, his conduct in approaching without bringing his train under control would present an altogether different question. Now, in pleading negligence, it is necessary to plead facts, and not conclusions, and I think whether it is necessary for the plaintiff to aver facts to show the freedom of Babbitt from contributory negligence, it is proper to plead these facts upon the question of the negligence of the engineer.

There may be some repetition in the petition here in nine and ten, but it is not every case of redundancy which necessitates an amendment. Revised Statutes 5115 (Lan. 8630) requires the court at every stage of a proceeding to disregard any error or defect in pleadings or proceedings which does not affect the substantial rights of the adverse party.

I am of opinion, however, that the last branch of the motion which asks that the averment concerning payment of the excess of the value of the property to the owner be stricken out, should be overruled. If the assured has any interest or his whole loss was not paid he is a necessary party. Clement, Insurance 369. From the averments of the petition it appears her loss was greater than the plaintiff's claim, hence the necessity of this averment to explain the absence of one who could otherwise be a necessary party. It would certainly appear on the trial that the loss was greater than plaintiff's claim, and put it in defendant's power to defeat the action for want of necessary parties.

The amendment may be made under the rule.

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INSURANCE.

[Cuyahoga Common Pleas, April 16, 1906.]

P. A. CONNELLY v. J. W. PICKARD, JR.

REVISED STATUTES 283 (LAN. 356) DOES NOT BAR RECOVERY OF COMMISSION ON CONTRACT FOR PROCURING INSURANCE.

A person recommending an insurance agency and procuring insurance for this agency under a contract by which he receives a commission for insurance so obtained is not barred from recovering his commissions by the terms of Rev. Stat. 283 (Lan. 356), on the ground that he has no authority from the foreign company nor license from the state superintendent of insurance.

[Syllabus approved by the court.]

G. C. Hansen, for plaintiff.

Kramer & Chapman, for defendant.

BABCOCK, J.

The plaintiff brings suit against the defendant, an insurance agent, to recover a balance claimed to be owing him on an agreement to pay him a percentage of the first annual premium upon an insurance policy, for his services in recommending the insured to the defendant for the purpose of procuring life insurance.

Plaintiff is the agent of the owners of the block known as "The Society for Savings" in the city of Cleveland, and a part of his duties is looking after the offices and collecting rents from the tenants.

The defendant is the agent of insurance companies not organized under the laws of, but doing business in, the state of Ohio, with offices in said office building.

There is no controversy but what the defendant promised plaintiff a commission upon the first installment of premium paid by any person who should take out insurance in the office of the defendant at the recommendation of the plaintiff. But a controversy arises as to whether it was to be a percentage on the first annual premium or upon the first installment.

Plaintiff recommended one to the defendant, who wrote a policy upon his life and, at the request of the insured, made the premium payable quarterly instead of annually; and the contention of the defendant is, that the percentage agreed to be paid should be estimated upon the quarterly, rather than the annual, premium.

It is further contended by the defendant that Rev. Stat. 283 (Lan. 356) makes the agreement, in any event, unlawful, and bars a recovery by plaintiff on the promise, whatever may have been its terms.

The court finds that the minds of the parties met on the agreement to pay a percentage on the annual premium, and that the policy would have been so written but, to accommodate the insured, his payments

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were made payable quarterly. Finding that the understanding of the parties was, that the plaintiff was to receive the commission on the annual premium, he is entitled to recover unless the provisions of this section of the Revised Statutes makes unlawful the promise so made by the defendant.

This section, among other things, provides that,

"It shall be unlawful for any person * * * to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by the company and unless duly licensed by the superintendent of insurance."

It is claimed that this plaintiff comes within the terms of the statute making it unlawful in any manner to aid in the transaction of insurance business, unless authorized by the insurance company and licensed by the superintendent of insurance. The plaintiff was neither authorized by the company nor licensed by the commissioner of insurance. If his service under this agreement is to be construed as in some way aiding in the transaction of insurance business, as defined by the statute, the agreement is unlawful; otherwise, not.

Was the service he rendered such as needed to be authorized by the company, and, for doing such service, is he entitled to a license from the commissioner of insurance? I think not. To have been authorized by the company would have made him an insurance agent, so that whatever he did or said, and whatever representations the insured made to him in the matter of taking the application would have bound the company. A person thus authorized must, under the provisions of the insurance laws of the state, take out a license and pay the required fee.

It certainly cannot be successfully maintained that the statute intends that every indirect aiding and assisting an insurance business come within the provisions of this statute. If so, the accountant or bookkeeper of the agency, the amanuensis who takes dictation and writes for the agent his letters, the office boy, and the janitor who makes the fires, would have to be authorized by the company and to take out licenses, for they indirectly aid in the transaction of the business. The purpose of the statute is to require all agents, general agents, subagents, and soliciting agents, to be licensed, and only such. The test is, whether the person, thus aiding, is acting in such a capacity that his act is the act of the company. Only such persons can receive licenses from the superintendent of insurance.

In this case, it cannot be successfully maintained that the plaintiff, who was simply to recommend an insurance agency, is thereby empowered to represent the company so that what he may have said or done bound the company. And it, therefore, follows that defendant

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cannot avail himself of this section of the statute to avoid the promise made. The plaintiff is, therefore, entitled to recover the balance owing, which I find to be \$24.35.

It is argued that this section of the statute is unconstitutional, but having found that it has no application to the case at bar, no determination of that question is made.

INSURANCE—PARTIES.

[Franklin Common Pleas, April 17, 1906.]

SUPERIOR MANTEL CO. V. UNDERWRITERS MUT. FIRE INS. CO. ET AL.

LIABILITY OF FIRE INSURANCE COMPANIES INSURING SAME PROPERTY BY DIFFERENT POLICIES IS SEVERAL, NOT JOINT.

Several fire insurance companies insuring one piece of property in separate policies, though providing that each shall stand only its proportion of the loss, may not be joined as defendants in one petition by the insured to recover for a loss sustained. *Good v. Insurance Co.* 43 Ohio St. 395, followed.

[Syllabus approved by the court.]

Krumm & Krumm and C. A. McCleary, for plaintiff.

F. D. Prentise and J. M. Sheets. for defendant.

BIGGER, J.

This is an action brought against several insurance companies jointly to recover for a fire loss. The defendants have severally demurred to the petition on the ground, first that there is a misjoinder of parties defendant, and second, that several causes of action against several defendants are improperly joined.

The policies upon which a recovery is sought are separate and distinct policies. The liability of each company is to be determined from the contract or policy of insurance written by it upon the property. Each policy contains a provision, it is alleged, that the company should not be liable upon the policy for a greater proportion of any loss on the property covered by it than the amount thereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurers.

Clearly upon principle and authority the application of these several companies is several and not joined. This has been expressly decided by the supreme court of this state in the case of *Good v. Insurance Co.* 43 Ohio St. 395 [2 N. E. Rep. 420].

My attention is called to a case decided by the common pleas court of Lucas county, holding that in a case somewhat similar that such joint action might be maintained. The case is not exactly parallel with this, but whether that case was rightly decided or not it seems to me there can be no question that the decision in *Good v. Insurance Co. supra*, controls this case, and that the demurrers are well taken and must be sustained.

Manufacturing Co. v. Manufacturing Co.

CONSTITUTIONAL LAW—CORPORATIONS.

[Champaign Common Pleas, April 28, 1906.]

SHEETS MFG. CO. v. NEER MFG. CO. ET AL.

1. CONSTITUTIONAL AMENDMENT AS TO STOCKHOLDER'S LIABILITY REPEALED BY IMPLICATION STATUTE IN FORCE AT THE TIME.

The amendment to Sec. 3, Art. 13 of the constitution of the state respecting the additional liability of stockholders of a corporation, repealed by implication the statute, Rev. Stat. 3258 (Lan. 5202), in force at the time of its enactment, November 23, 1903, because irreconcilably inconsistent therewith.

2. CONSTITUTIONAL AMENDMENT AS TO STOCKHOLDERS' LIABILITY SELF-EXECUTING.

The amendment of November 23, 1903, to the constitution of Ohio, providing in terms that, "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him," needed no subsequent legislation to make it effective and was self-executing from the date thereof. Therefore the double liability of stockholders was abolished and stockholders relieved therefrom as to debts incurred by the corporation on and after that date.

[Syllabus approved by the court.]

Buroker & Zimmer, Waite & Deaton, T. J. Frank and L. D. Johnson, for plaintiff:

This new constitutional provision was inoperative until rendered effective by subsequent legislation, and in such case, those whose right are effected by such amendment remain as before its adoption until the enactment of a statute rendering it effective. In other words, the constitutional amendment was not self executing. *Hendershot v. State*, 44 Ohio St. 208 [6 N. E. Rep. 245]; *Lamb v. Lane*, 4 Ohio St. 167; 6 Am. & Eng. Enc. of Law (2 ed.) 912; *State v. Holmes*, 12 Wash. 169 [40 Pac. Rep. 735]; *Missouri, K. & T. Ry. v. Railway*, 10 Fed. Rep. 497; *Brown v. Seay*, 86 Ala. 122 [5 So. Rep. 216]; *State, Ex parte*, 52 Ala. 231 [23 Am. Rep. 567]; *St. Louis, A. & T. Ry. v. Fire Assn.* 60 Ark. 325 [30 S. W. Rep. 350; 28 L. R. A. 83]; *Wall, Ex parte*, 48 Cal. 279 [17 Am. Rep. 425]; *Ewing v. Mining Co.* 56 Cal. 649; *Spinney v. Griffith*, 98 Cal. 149 [32 Pac. Rep. 974]; *Green v. Aker*, 11 Ind. 223; *McCullom v. Pipe*, 7 Kan. 189; *Bowie v. Dott*, 24 La. Ann. 214; *St. Joseph Pub. Schools v. Patten*, 62 Mo. 444; *Jerman v. Benton*, 79 Mo. 148; *Fusz v. Spaunhorst*, 67 Mo. 256; *Price v. Smith*, 93 Va. 14 [24 S. E. Rep. 474]; *Dodridge Co. v. Stout*, 9 W. Va. 703; *Fremont Co. v. Perkins*, 38 Pac. Rep. 914 (Wyo.); *Morley v. Thayer* 3 Fed. Rep. 737; *Norman v. Cain*, 17 Ky. App. 492 [31 S. W. 860]; *Williams v. Detroit*, 2 Mich. 560; *Lehigh Iron Co. v. Lower Macungie Tp.* 81 Pa. St. 482; *Coatesville Gas Co. v. Chester Co.* 97 Pa. St. 476; *Long v. Billings*, 7 Wash. 267 [34 Pac. Rep. 936]; *Tacoma v. State*, 4 Wash. 64 [29 Pac. Rep. 847]; *New Castle v. Lawrence Co.* 2 Pa. Dist. Rep. 95; *People v. Lake Co.* 33 Cal. 487; *Holzhauser v. Newport*, 94 Ky. 396 [22 S. W. Rep. 752]; *United States v. Reese*, 92 U. S. 214 [23 L. Ed. 563]; *Hays*

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v. *Hays*, 5 Idaho 154 [47 Pac. Rep. 732]; *Blake v. Ada Co. (Comrs.)* 5 Idaho 163 [47 Pac. Rep. 734]; *Fowler v. Lamson*, 146 Ill. 472 [34 N. E. Rep. 932; 37 Am. St. Rep. 163].

Whether or not constitutional provisions declaring stockholders individually liable for corporate indebtedness are self-executing, depends largely upon the language of the particular provision, and hence the authorities are not entirely uniform but as a rule such provisions are not self-executing. *Lamson v. Fowler*, 44 Ill. App. 186; *Fowler v. Lamson*, 146 Ill. 472 [34 N. E. Rep. 932; 37 Am. St. Rep. 163]; *Schertz v. Bank*, 47 Ill. App. 124; *Marshall v. Sherman*, 148 N. Y. 9 [42 N. E. Rep. 419; 34 L. R. A. 757; 51 Am. St. Rep. 654]; *Tuttle v. Bank*, 161 Ill. 497 [44 N. E. Rep. 984; 34 L. R. A. 750]; *French v. Teschemacher*, 24 Cal. 518; *Morley v. Thayer*, 3 Fed. Rep. 737.

Banta & Banta, for defendants.

MIDDLETON, J.

This action is brought by the plaintiff against the Neer Manufacturing Company and the stockholders of said company to enforce the stockholders' statutory liability. Among these stockholders are John M. Niles and Amanda J. Niles.

The action is brought upon an account in the sum of \$198.99, a copy of the account is annexed to the petition marked "Exhibit A" and made a part thereof. The only item of debit in said account is dated March 17, 1904—"To lumber, \$401.75." There are two credits in the account, one of May 27, 1904, \$200: one of August 30, 1904, \$2.76, making a total credit of \$202.76, and leaving a balance due upon said account of \$198.99, the amount sued upon. The petition contains the usual averments necessary to show the liability of the several defendant stockholders, but there is no averment in the petition that any one of the defendant stockholders is indebted to the defendant company for unpaid stock owned by him or her.

The defendants, John M. Niles and Amanda J. Niles, each demur to the petition for the reason that the same does not state facts sufficient to constitute a cause of action against them.

The indebtedness in favor of the plaintiff, the Sheets Manufacturing Company, as shown by the account made a part of the petition, was contracted March 17, 1904, and in support of the demurrer filed by these two defendants it is urged that upon this date, March 17, 1904, there was no double liability attaching to stockholders of a corporation under the constitution and statutes of the state of Ohio, and as the petition contains no averment that either of these defendants were indebted to the defendant company for unpaid stock subscription owned by them, that no cause of action is stated in the petition against either, and, therefore, the demurrer should be sustained.

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The question thus raised leads to a consideration of the liability of stockholders of a corporation under the old constitution of 1851, Sec. 3, Art. 13, and the statute enacted to enforce such constitutional provisions, Rev. Stat. 3258, 3258a (Lan. 5202, 5203), as amended and enacted April 29, 1902 (95 O. L. 312), and the effect upon the provisions of the constitution of 1851 and the statute passed to carry the same into effect by the amendment of Sec. 3, Art. 13, adopted November 3, 1903, and which became a part of the constitution November 23, 1903, and the act of the legislature of Ohio, passed April 25, 1904 (97 O. L. 390), amending Rev. Stat. 3258, 3258a (Lan. 5202, 5203), for the purpose of carrying into effect the constitutional amendment of November 23, 1903; also an act of the general assembly of Ohio, passed April 29, 1902 (95 O. L. 312).

The indebtedness in favor of the Sheets Manufacturing Company, the plaintiff, upon which the suit is commenced, was contracted March 17, 1904, between the time when the amendment to the constitution adopted November 3, 1903, became a part of the constitution, to wit, November 23, 1903, and the enactment of the statute carrying into effect this amendment to the constitution, passed by the legislature April 25, 1904; and it is contended by counsel for the plaintiff that this being so the provisions of the old statute remained in effect until the passage of the act of April 25, 1904, and hence double liability attached to the defendant stockholders at the time this indebtedness was contracted, March 17, 1904.

The only question argued by counsel by briefs submitted in support of or against the demurrers is, whether or not the amendment to the constitution, which went into effect November 23, 1903, is or is not self-executing. If self-executing, no double liability, it is claimed, could attach to these stockholders at the time the debt was contracted; but there are other questions, in the opinion of the court, involved in a full consideration and determination of the questions raised by the demurrers, and these the court has thought necessary to consider in arriving at a conclusion.

The provisions of the constitution of 1851 are as follows:

Section 3, Art. 13. "Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

Prior to the amendment of April 29, 1902 (95 O. L. 312; Lan. 5202), repealing the same, Rev. Stat. 3258 provided as follows:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal

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to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

On April 29, 1902 (95 O. L. 312; Lan. 5202), the legislature passed an act amending and repealing Rev. Stat 3258, which act provides as follows:

"The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable against them, shall be deemed and held liable, equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held, to the creditors of the corporation, to secure the payment of such debts and liabilities; and no stockholder who shall transfer his stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate of stock properly witnessed or tendered for transfer on the books of the company prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof."

On November 3, 1903, by a vote of the electors, Sec. 3, Art. 13 of the constitution was amended, which amendment provides as follows:

"Section 3. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

This amendment became a part of the constitution November 23, 1903.

On April 25, 1904 (97 O. L. 390), the legislature passed an act repealing Rev. Stat. 3258, 3258a (Lan. 5202, 5203), which provides as follows:

Revised Statutes 3258 (Lan. 5202). "The stockholders of a corporation who are holders of its shares at a time when its debts and liabilities are enforceable against them, shall be deemed and held liable, equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held, to the creditors of the corporation, to secure the payment of such debts and liabilities; and no stockholder who shall transfer his stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate of stock properly witnessed or tendered for transfer on the books of the company prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof. Provided, however, that the above provisions of this section shall not apply to stockholders in any corporation created after the twenty-third of November, 1903, nor shall it apply to any debts or liabilities of any corporation incurred after said date; and as all debts and liabilities of corporations for profit incurred after said date, the stockholders of said corporations shall be

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under no liabilities other than thus stated in Sec. 3, Art. 13 of the constitution of Ohio."

This act of April 25, 1904, is intended to carry into effect the amendment to Sec. 3, Art. 13 of the constitution, which became a part of the constitution November 23, 1903, and to preserve to creditors of corporations their right to hold stockholders liable for debts and liabilities incurred prior to the amendment; and by express provisions relieves stockholders of any corporation created after November 23, 1903, from double liability and also from double liability for any debts or liabilities incurred after said date.

The debt upon which this action is brought was incurred by the corporation after November 23, 1903, to wit, March 17, 1904. If, therefore, this act of April 25, 1904, is a valid constitutional enactment no double liability attached to the defendant stockholders on account of the debt, and the demurrers should be sustained.

Is this act in violation of the constitutional provisions in effect at the time of its passage? Counsel have cited a decision of the circuit court of the seventh district (Mahoning county) rendered at its March term, 1905, the case of *Swift v. Baking Co.* 27 O. C. C. 253, in which the court held (two judges concurring and one dissenting) the act of April 29, 1902 (95 O. L. 312), in violation of Sec. 3, Art. 13 of the constitution and wholly inoperative, and in which the court say in concluding the reported opinion, "The same holding should be made as to the act of April 25, 1904 (97 O. L. 390)."

I have been unable to see how the validity of this act was drawn into the consideration of that case or any reasoning of the court leading to this conclusion. The liabilities upon which the action was brought in that case were all incurred between January 1, 1903, and May 2, 1903, and prior to the amendment which became a part of the constitution November 23, 1903.

In that case the circuit court had under consideration the validity of the act of April 29, 1902, under the constitution as it was when the act was passed, and basing its opinion on the decision of the Supreme Court, *Brown v. Hitchcock*, 36 Ohio St. 667, 678, and *Harpold v. Stobart*, 46 Ohio St. 397 [21 N. E. Rep. 637; 15 Am. St. Rep. 618], held the act void.

In passing upon the case the court says, page 256:

"It is conceded that the Supreme Court has distinctly decided in two cases under the statutes that preceded the act of April 29, 1902, that the stockholders became liable at least as guarantor or surety from the date that the debt was contracted, and that a subsequent sale and transfer of his stock, although *bonafidely* made, did not release him. * * *

"The majority of the court is of the opinion that these cases distinctly decide that, by the provision of Sec. 3, Art. 13 of the constitution, by its

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terms, independent of the statute, the liability of the stockholders attaches at the time the liability is incurred by the corporation and that that is the settled law of this state under the constitution, as construed by the Supreme Court and, therefore, the act of April 29, 1902, is in violation of the constitution of the state."

Now let us consider the provisions of the constitution in force with reference to the liability of stockholders when the cases of *Brown v. Hitchcock* and *Harpold v. Stobart*, *supra*, were decided by the Supreme Court, and when *Swift v. Baking Co.* *supra*, was decided by the circuit court. The constitutional provision was:

"Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

In the case of *Brown v. Hitchcock*, *supra*, Judge White, in announcing the opinion of the court, says, page 677:

"The constitution, in providing for the creation of corporations by the general assembly, prescribes, as a condition to their creation, that the creditors of such corporations, in addition to the liability of the corporation, shall be secured by the individual liability of the stockholders. The constitutional provision is as follows."

Then follows a statement of the constitutional provisions as above quoted.

The act of April 29, 1902 (95 O. L. 312), provided that only stockholders of a corporation, who were the holders of its shares at a time when its debts and liabilities were enforceable against them, should be deemed and held liable, etc., and further provided that no stockholder who shall transfer his stock in good faith, etc., prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof.

This act, changing the liability of the stockholders of a corporation from the liability imposed upon them by the constitution as construed by the Supreme Court in *Brown v. Hitchcock* and *Harpold v. Stobart*, *supra*, the circuit court held to be wholly inoperative and void.

But what were the provisions of the constitution relative to securing dues from corporations and the individual liability of stockholders when the act of April 25, 1904 (97 O. L. 390), was passed? No one will question but that the constitution with respect to these subjects had undergone a change, a very material one; that the amendment to Sec. 3, Art. 13, of that instrument adopted by a vote of the people November 3, 1903, became a part of the constitution November 23, 1903.

This amendment is as follows:

"Dues from private corporations shall be secured by such means

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as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

This was the constitutional provision relating to dues from private corporations under which the act of April 25, 1904, was passed.

Is such act then constitutional? It is well settled that a statute should not be declared unconstitutional unless it is clearly and unreconcilably so. If a doubt exists as to the constitutionality of a statute the benefit of the doubt is to be given to the law. It first secures to the creditors of a corporation their right to enforce double liability against stockholders, as such right existed up to the time of the amendment, on all debts and liabilities contracted prior to that time, and releases stockholders from double liability for any debts or obligations incurred by the corporation subsequent to the amendment. I am unable to see, therefore, how this law in any manner violates the provisions of the constitution, Sec. 3, Art. 13, as they stood at the time of its enactment.

It might be claimed that the retroactive feature of this act, applying as it does to all debts and obligations incurred after November 23, 1903, renders it void as impairing the obligation of contract, but this contention I am of the opinion would not be well founded.

It is true the relation between the creditors of a corporation and the stockholders concerning their individual liability for the debts of the corporation is held to be in the nature of a contract (*Brown v. Hitchcock*, 36 Ohio St. 667, and cases cited thereunder); but such relation there cited results from constitutional and statutory provisions imposing individual liability upon stockholders and it follows, therefore, if there are no constitutional and statutory provisions imposing such individual liability at the time the debt is contracted, no such relation arises between the creditor and stockholder.

In the case of *Brown v. Hitchcock*, *supra*, White, J., says:

"Our constitution and laws therefore make it an essential condition to persons availing themselves of the instrumentality of a corporation for the transaction of business that the security of their personal liability shall attach to and attend all corporate liabilities."

After the amendment of Sec. 3, Art. 13 became a part of the constitution, November 23, 1903, there was no double liability attaching to stockholders of a corporation by virtue of any constitutional provision, and in the opinion of the court no statutory law in force providing such liability, and here we have, in the opinion of the court, an instance in which the amendment to the constitution of November 23 in a way enforces itself. In the opinion of the court Rev. Stat. 3258 (Lan. 5202) was inconsistent with the amendment to the constitution of November 23 and by implication was repealed by it when it took effect; at least so

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much of said section as provided double liability of stockholders was repealed.

Repeals by implication are not favored, and still it is well settled that where the repugnancy between the provisions of two statutes is clear and so contrary to each other that they cannot be reconciled, the later will operate as a repeal of the former and the same rule applies when the repugnancy exists between a constitutional provision and a legislative enactment.

Judge Ranney in *State v. Dudley*, 1 Ohio St. 441, stating the rule as above, says:

"This rule is the result of a long course of decisions, and we know of no reason why it does not equally apply, when the repugnancy is alleged to exist between a constitutional provision and a legislative enactment."

The same doctrine is announced in *Cass v. Dillon*, 2 Ohio St. 607; *State v. Union Tp. (Tr.)* 8 Ohio St. 394; *Knox Co. (Comrs.) v. Nichols*, 14 Ohio St. 260.

In these cases no such repugnancy between the constitutional provisions and the legislative enactment was found to exist as would warrant the holding that the former repealed the latter by implication, but the rule is clearly stated that had such repugnancy existed, the rule of repeal by implication would apply.

A decision directly in point in this case in the opinion of the court is found in the case of *State v. Chase*, 5 Ohio St. 528 (discussion by the court on pages 539 and 540).

In passing the act of April 25, 1904 (97 O. L. 390), the legislature seems to have taken a different view of the effect of the amendment on Rev. Stat. 3258, 3258a (Lan. 5202, 5203), because by the act it expressly repeals these sections; but this is of little consequence, if as this court thinks there was such repugnancy between the amendment and the statute that both could not stand. The statutes, Rev. Stat. 3258, 3258a (Lan. 5202, 5203), at the time of the amendment provided that:

"The stockholders of a corporation who are the holders of its shares at the time when its debts and liabilities are enforceable against them, shall be deemed and held liable * * * in addition to their stock by them held to the creditors of the corporation to secure the payment of such debts and liabilities."

The amendment to the constitution of November 23, 1903, provides:

"In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

It, therefore, seems to the court that these provisions, at least as far as they relate to double liability of stockholders, are so repugnant and contrary to each other that they cannot be reconciled and that the statute ceased to operate when the amendment took effect.

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A case bearing a very close analogy to this case is found in *State v. King*, 69 N. C. 419.

The indictment against the defendant, King, was found at the fall term, 1872, and charged that on the first day of May, 1863, the defendant burned a gristmill willfully and feloniously against the form of the statute. The judge quashed this bill and the state appealed. At the time this offense was alleged to have been committed in 1863 the law punished the offense with death. Section 2, chapter 34 of the revised code of that state. In 1868 Art. 11 of the constitution of the state was enacted as follows:

"Section 1. The following punishment only shall be known to the laws of this state, viz: death, imprisonment with or without hard labor, fines, removal from office, etc.

"Section 2. Murder, arson, burglary and rape, and these only may be punished with death if the general assembly shall so enact."

On April 10, 1869, the next year after the enactment of the constitutional provision just referred to, the general assembly passed an act as follows:

"Every person convicted of any crime whereof the punishment hitherto has been death by the laws of North Carolina, existing at the time the present constitution went into effect, other than the crimes before specified (among which crimes specified in the act was not included the one charged, to wit, willfully and feloniously burning a gristmill), shall suffer imprisonment in the state's prison for not less than five nor more than sixty years."

Counsel for the defendant in this case contended that he could not be punished by the revised code for that had been repealed by the constitution or by that in connection with the act of 1869; nor by that act because it was not retrospective; nor by the common law because by that the offense was only a misdemeanor, and the prosecution of a misdemeanor was barred after two years.

In passing upon this case the court says:

"We think the counsel takes a mistaken view of the intent and effect of the constitution. The effect of his interpretation of Secs. 1 and 2, Art. 11 would be, that immediately upon the adoption of the constitution all offenses which were punishable otherwise than by fines and imprisonment (including murder, arson, burglary and rape), would cease to be punishable by the legislature. We say, including murder, etc., for it was evidently the intention of Sec. 2 that these offenses should cease to be punishable with death, unless the legislature should so enact. It is true that counsel does not push his proposition quite so far; he admits that the common-law punishment would be imposed provided the offense was not out of date. But it cannot have been the intention of the constitution to restore, for the interval which must have been foreseen between

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its adoption and the action of the legislature, the common-law punishment, for among these were whipping and the pillory, the very punishments which it was most anxious to prohibit."

And then the court adds further along in the opinion:

"The constitution does not repeal section 2 of chapter 34 of the revised code; it repeals only so much of it as imposes death as a punishment for this offense."

It will seem that the court in this case held that the constitutional enactment of 1868 repealed, upon its going into effect, that portion of the statute or of the revised code of the state, which made the offense of willfully and feloniously burning a structure, such as was described in the statute, punishable by death; and it will be noticed further that in this case the court, without holding that all the provisions of this statute was repealed by the constitutional enactment, held that the prohibitory matter contained in the constitutional provision, and which was inconsistent and irreconcilable with the statute, repealed the statute to that extent.

By a parity of reasoning I can see no reason why the amendment amending Sec. 3, Art. 13 of the constitution of the state, of November 23, 1903, which is absolutely prohibitory in its character, should not be held to have repealed, by implication at least, the provisions of Rev. Stat. 3258 (Lan. 5202) in force at the time of the adoption of this amendment, providing for double liability.

And now as to the question of whether or not this amendment to the constitution, independent of the question of repeal by implication, is or is not self-executing.

It is no doubt true that often new constitutional provisions are treated as inoperative until rendered effective by subsequent legislation, and in such cases those whose rights are affected by such provisions remain as before their adoption until the enactment of a statute rendering them effective. And that such provisions will be held to be inoperative in cases where the object sought to be accomplished by them is made to depend in whole or in part upon subsequent legislation. And it seems to be well settled by the weight of authorities that constitutional provisions designed to secure dues and demands against corporations by imposing liability therefor upon the stockholders thereof in addition to the stock held by each and by such other means as provided by law, are not self-executing. And that if constitutional provisions merely enact a line of policy or principles without supplying the means by which such policies or principles are to be carried into effect, they are not self-executing and will remain inoperative until rendered effective by subsequent legislation.

The authorities in support of this proposition are abundant and are cited in the brief of counsel for the plaintiff in this case. But it will be

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seen at a glance by a mere reading of the amendment to the constitution of November 23, 1903, that this amendment was not designed alone to secure dues and demands against corporations by such means as may be provided by law, but it contains the further provision:

"In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

I cannot understand how this provision of the constitution could be made more effective by subsequent legislation. I cannot understand why this provision is made to depend in whole or in part upon any subsequent legislation. It is not a constitutional provision, in the opinion of this court, merely indicating a line of policy or principle without supplying the means by which such policy and principles are to be carried into effect. It is, as I have said, absolutely prohibitory in its character and could not as I can conceive be made more effective by subsequent legislation than it is made by the constitutional provision itself.

In a leading and well-considered case found in *Law v. People*, 87 Ill., 385, the court, in construing a constitutional provision of the constitution of the state of Illinois, say:

"The constitutional provision supposed to be violated by the issuing of these certificates for temporary loans, is the first clause of the twelfth section of article 9 and is this: No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five percentum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness.

"The language of this clause is clear, explicit and emphatic, that no city shall be allowed to become indebted in any manner or for any purpose beyond the prescribed limit. The city of Chicago was indebted beyond the limit when these certificates were issued, and if they, in any manner or for any purpose, create an additional indebtedness beyond that limit, they are clearly prohibited. The language prescribing the limit is so plain as to admit of no doubt, and forbids all construction and the provision must be enforced as it is written. When the intention of the framers of the constitution is ascertained, it must, as all will concede, be held paramount to all other powers in the state. It embodies the sovereign power of the state. It is the source to which all the departments of government, and all of its officers must ultimately look, to authorize and sanction their official acts. It is the command of the supreme power of the state and it must be obeyed. Nor is there lodged, in our form of government, in any department or functionary, any authority to dispense with this or other provisions of the fundamental law, or to mitigate its requirements.

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"It has also been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitory clauses of this character found in a constitution execute themselves as legislative provisions, in the same or other language, prohibiting the incurring of such indebtedness, could be no more binding or forcible than the constitution itself."

It seems to this court, therefore, that to hold that this provision of the amendment to our constitution of November 23, 1903, was not self-executing and that such provision needed legislative enactment to give it force, would be in effect to hold that the legislature of Ohio was clothed with authority to enforce or not to enforce this prohibitory provision of the constitution by subsequent legislation as it might deem best, and that if the legislature should fail or refuse, for any reason, to enact a law to carry into force and effect this prohibitory provision of the constitution, that, notwithstanding its clear, explicit and emphatic declaration, that in no case shall any stockholder of a corporation be held individually liable otherwise than for the unpaid stock owned by him or her, that the statute (Rev. Stat. 3258; Lan. 5202) imposing double liability would continue for all time to be and remain in force.

I cannot conceive such to have been the intention and meaning of the framers of this amendment to our constitution.

It follows that the demurrers of the defendants, John M. Niles and Amanda J. Niles, to the petition of the plaintiff in this case should be sustained and the action of plaintiff dismissed.

CONTEST OF ELECTIONS.

[Darke Common Pleas, January Term, 1906.]

*A. N. WILSON v. T. C. MAHER.

1. DECISION OF FREEHOLDERS IN MAYOR'S ELECTION CONTEST, NOT REVIEWABLE ON ERROR.

The decision of the freeholders summoned by the probate judge in a proceeding to contest the election of mayor of an incorporated village cannot be reviewed on error in the court of common pleas.

2. BILL OF EXCEPTIONS NOT AUTHORIZED.

Nor is a bill of exceptions authorized in such contest proceedings.

3. SERVICE OF NOTICE CONTROLLED BY CODE OF CIVIL PROCEDURE.

The notice provided for to the contestee may be served in the same manner as a summons under the code of civil procedure.

[Syllabus by the court.]

D. L. Gaskill, T. C. Miller, H. M. Cole, W. W. Teegarden and J. M. Hoel, for plaintiff in error.

D. W. Bowman, J. C. Clark, A. C. Robeson, O. R. Krickenberg, S. V. Hartman and John Maker, for defendant in error:

*Affirmed by circuit court, May term, 1906.

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Cited and commented upon the following authorities. *Edwards v. Knight*, 8 Ohio 375; *State v. Stein*, 13 Neb. 529 [14 N. W. Rep. 481]; *State v. Boal*, 46 Mo. 528; *Miller v. Palermo (Town)*, 12 Kan. 14; *People v. Ryder*, 12 N. Y. 433; *State v. Long*, 91 Ind. 351; *Reynolds v. State*, 61 Ind. 392; Mechem, Pub. Off. Sec. 491; *State v. Wright*, 56 Ohio St. 540 [47 N. E. Rep. 569]; *State v. Marlow*, 15 Ohio St. 114; *State v. Taylor*, 15 Ohio St. 137; *State v. Berry*, 47 Ohio St. 232 [24 N. E. Rep. 266]; *State v. O'Brien*, 47 Ohio St. 464 [25 N. E. Rep. 121]; *State v. Berry*, 14 Ohio St. 315; *Peck v. Weddell*, 17 Ohio St. 271; *State v. McLain*, 58 Ohio St. 313 [50 N. E. Rep. 907]; *State v. Stewart*, 26 Ohio St. 216; Mechem, Pub. Off. Secs. 486, 487; *State v. Conser*, 24 O. C. C. 270; McCrary, Elections Secs. 369, 395, 425, 515; *Attorney General v. Sands*, 68 N. H. 54 [44 Atl. Rep. 83]; *People v. Hall*, 80 N. Y. 117; *State v. Hardie*, 1 Ired. (N. C.) 42; *State v. Lewis*, 51 Conn. 113; *Onondaga (Suprs.) v. Briggs*, 2 Denio 26; *Demarest v. Darg*, 32 N. Y. 281; *Lyon v. Dunn*, 196 Pa. St. 90 [46 Atl. Rep. 384]; *State v. Belmont Co. (Comrs.)* 31 Ohio St. 451; *State v. Harmon*, 31 Ohio St. 250; *Stearns v. Wyoming (Vil.)*, 53 Ohio St. 352 [41 N. E. 578]; *Robertson v. State*, 109 Ind. 79 [10 N. E. Rep. 582, 643]; *State v. Baxter*, 28 Ark. 129; *State v. Tomlinson*, 20 Kan. 692; *People v. Mahaney*, 13 Mich. 481; *People v. Fitzgerald*, 41 Mich. 2; *Alter v. Simpson*, 46 Mich. 138; *State v. Gilmore*, 20 Kan. 551 [27 Am. Rep. 189]; *O'Ferrall v. Colby*, 2 Minn. 180; Cooley, Const. Lim. 133; *Hulseman v. Rems*, 41 Pa. St. 396; *Taylor v. Beckham*, 178 U. S. 548 [20 Sup. Ct. Rep. 890, 1009 [44 L. Ed. 1187]; *Taylor v. Beckham*, 108 Ky. 278 [56 S. W. Rep. 177; 49 L. R. A. 258; 94 Am. St. Rep. 357]; *Commonwealth v. Garrigues*, 28 Pa. St. 9 [70 Am. Dec. 103]; *Commonwealth v. Leech*, 44 Pa. St. 332; *People v. Goodwin*, 22 Mich. 496; *Baxter v. Brooks*, 29 Ark. 173; *Batman v. Megowan*, 58 Ky. (1 Metc.) 533; *Phelps v. Schroder*, 26 Ohio St. 549; *Powers v. Reed*, 19 Ohio St. 189; *State v. Buckland*, 23 Kan. 259; *La Pointe (Suprs.) v. O'Malley*, 46 Wis. 35; *Gano v. State*, 10 Ohio St. 237.

ALLREAD, J.

This action is a proceeding in error to review the judgment and rulings of the probate court on a contest of the election for mayor of the city of Greenville.

The election, as canvassed by the election officers, resulted in a tie. Lots having been cast, the result was in favor of A. N. Wilson, who received the certificate of election. T. C. Maher, the opposing candidate, thereupon contested the election. The contest resulted in favor of Maher. A motion for a new trial was thereupon filed in the probate court and overruled. A bill of exceptions was then taken, embodying the evidence taken on the trial together with the rulings of the court and is now brought before this court for review.

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The defendant in error files a motion to strike the bill of exceptions from the files and also objects to the jurisdiction of this court to review the judgment upon proceedings of the contest.

As to the validity of the bill of exceptions, the circuit court of this county in the case of *Bachman v. Wright* (*unrep.*), involving also a contest of an election for mayor, held:

"That there is no right to take a bill of exceptions and that we cannot review the questions presented by the bill of exceptions."

It is claimed, however, that more recent decisions of the circuit court in the Washington C. H. cases under the Beal law destroy the force of the decision in *Bachman v. Wright*, *supra*. But an examination of the Beal law discloses that election contests under that act are triable to the probate judge and not to a jury of freeholders as in the case at bar. This distinction is vital, and harmonizes the two decisions of the circuit court. The law expressly authorizes a bill of exceptions to be taken where the judgment and final order is rendered by the probate court or a judge as provided for under the Beal law. But a bill of exceptions is not provided for where the final judgment or decision is rendered by a tribunal other than a court or judge.

The decision of the circuit court in the case of *Bachman v. Wright*, *supra*, being directly in point is controlling here and requires this court to sustain the motion of the defendant in error and strike the bill of exceptions from the files.

Counsel for plaintiff in error claim that even if the bill of exceptions be stricken from the files the court has authority to review the decision of the freeholders in connection with the points of contest upon which it is founded and also the sufficiency of the notice served or attempted to be served upon the contestee.

It will be observed from the statutes that the freeholders decide the contest. And that whether the decision be for the contestor or contestee the probate judge does not pass upon or confirm it nor can he set it aside or modify it. His jurisdiction as to the final judgment is limited to the question of costs and as the costs have been adjudged against the city plaintiff in error is not prejudiced thereby.

The question therefore is, Can the decision of the tribunal of freeholders be reviewed in this proceeding and if erroneous can the decision be set aside or the cause remanded for a new trial?

A contest of an election like the proceedings of the board of canvassers belong primarily to the administrative branch and is not considered judicial unless the jurisdiction to try and decide the contest be conferred upon a court or judge. *Powers v. Reed*, 19 Ohio St. 189; *State v. Harmon*, 31 Ohio St. 250; *Stearns v. Wyoming* (*Vil.*), 53 Ohio St. 352 [41 N. E. Rep. 578].

In the case of *State v. Harmon*, *supra*, it is said:

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"It was contended by counsel, in *Powers v. Reed*, that the authority to try contested elections was, in its nature, political or administrative, and might be conferred on any officer or political body, as well as upon the courts.

"This proposition was not denied by the court; but the decision is placed on the ground that, the power having been conferred on the court, its action was the exercise of judicial authority, and was subject, under the code, to review on questions of law."

The circuit court in the *Bachman v. Wright, supra*, did not pass expressly upon the question of the jurisdiction of the common pleas court on error but from the language employed there, as well as what is said by the Supreme Court in *Bachman v. Wright, supra*, it seems to follow that the appropriate remedy to review the form and substance of the decision of the freeholders in connection with the points of contest upon which the decision is founded is in an action in quo warranto brought directly to determine the title to the office. *State v. Wright*, 56 Ohio St. 540 [47 N. E. Rep. 569].

In the case just cited it is said that after the jury of freeholders have signed their decision and been discharged, they cannot be reassembled; hence a judgment of reversal on proceedings in error is not contemplated.

Again it is said in the same case—which it must be remembered was in quo warranto—on page 558:

"In order to deprive a person of an office to which he has been declared elected by the duly constituted election officers having that authority, and to which he bears the customary evidence of his title, the decision of a contest instituted against him should show on its face, with reasonable certainty, that he was not elected."

These authorities therefore sustain the claim that the decision of the freeholders cannot be reviewed in this court on error. The jurisdiction of this court is confined to a review of the final judgment and orders of the probate court. It is claimed that the probate court erred in the service upon the contestee; that the requirement of the statute as to notice is only fulfilled by personal service, and that without personal service the probate court had no jurisdiction to swear the freeholders or proceed with the trial.

The statute requires the probate judge to communicate to the contestee notice of the contest specifying certain matters and citing him, the contestee, to appear, and also that when he issues the notice to the contestee he shall appoint and summon three freeholders, etc.

From these terms so employed in the statute it appears that the notice must be "issued" by the probate court and that court must "cite" the contestee to appear.

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The term "cite" is thus defined: "to call" or "summon." "To notify a party of a proceeding against him or call him to appear and defend," and is applied particularly to process in the probate court. 6 Am. & Eng. Enc. Law (2 ed.) 13.

The writ therefore containing the notice and citation to be thus formally issued by the probate judge is the equivalent of the summons and is governed by the code of civil procedure as to the manner of service.

What the rule might be if the proceedings in contest were held to be wholly administrative and not judicial, so as to exclude the application of the code of civil procedure as to the manner of service need not be considered, for in that event the jurisdiction to review the sufficiency of the notice would not be conferred on this court.

The probate judge, however, after the decision of the freeholders was made, proceeded to render a judgment based upon the freeholders' decision to the effect that the contestee and not the contestor was duly elected. In doing so he exceeded his jurisdiction. He could only render judgment for costs. It may be claimed that the judgment of the probate court being without jurisdiction is harmless, but it has been held that a judgment even in excess of the court's jurisdiction may be reversed. *Haff v. Fuller*, 45 Ohio St. 495 [15 N. E. Rep. 479].

So much of the judgment of the probate court as assumes to render a judgment upon the contest itself is vacated, set aside and held for naught. In all other respects the proceedings of the probate court so far as they appear in the record exclusive of the bill of exceptions are affirmed. The decision of the freeholders is not reviewed for want of jurisdiction.

COSTS—EMINENT DOMAIN.

[Hamilton Common Pleas, March, 1906.]

WM. P. DEVOU ET AL. V. CINCINNATI INTERTERMINAL RY.

DEFENDANT DISMISSING CONDEMNATION PROCEEDINGS FOR FAILURE TO SHOW THAT PARTIES COULD NOT AGREE, NOT ENTITLED TO HIS COSTS, ETC.

Where condemnation proceedings have been dismissed on motion of the defendant property owner, on the ground that the evidence does not show an antecedent inability of the parties to agree on the amount of compensation, such defendant is not entitled to recover from plaintiff his costs, expenses, and attorney's fees under Rev. Stat. 6434 (Lan. 10011).

[Syllabus by the court.]

ERROR to the court of insolvency.

Keam & Keam, for plaintiffs.

John Galvin, for defendant.

Devou v. Railway.**S. W. SMITH, Jr., J.**

This case, heard on petition in error from the court of insolvency, presents the one question as to whether or not under Rev. Stat. 6434 (Lan. 10011), the defendant, William P. Devou, is entitled to recover from plaintiff the amount of his costs, expenses and attorney fees in a suit for condemnation by plaintiff in the court below against him, on the ground that the plaintiff abandoned its suit.

The court is of the opinion that he is not so entitled as the record shows by the journal entry of the court and transcript that the suit was dismissed below upon the motion of the defendant so to do. The defendant in error brought its condemnation suit, proceeded therein and, after the evidence was adduced upon the jurisdictional questions, plaintiff in error made a motion to dismiss the petition on the ground that it was not shown by the evidence as a matter of fact that there existed before the bringing of the action an inability to agree with the plaintiffs, William P. Devou and Herman Dieckmann, as to the compensation to be paid for the property owned by them or either of them sought to be condemned, and the court granted this motion and dismissed the case. This was not a voluntary abandonment of the condemnation suit, but was a dismissal by the court on the application of the defendant, and under such circumstances the court is of the opinion the plaintiff in error is not entitled to the relief provided for in Rev. Stat. 6434 (Lan. 10011). An order may be taken in accordance herewith.

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APPEAL—GUARDIAN AND WARD.

[Lorain Common Pleas, October 10, 1906.]

IN RE GUARDIANSHIP OF DELIA D. WALLACE.

GUARDIAN REMOVED BY PROBATE COURT FOR WANT OF JURISDICTION TO APPOINT
MUST FILE APPEAL BOND.

A guardian who is removed by the probate court because the court had no jurisdiction to appoint him, cannot perfect an appeal to the common pleas court from such order of removal, by merely giving written notice to the probate court, of his intention to appeal. In such a case he is not "a party in a fiduciary capacity," and does not "appeal in the interest of the trust," and hence is required by Rev. Stat. 6408 (Lan. 9984) to file a bond in order to effect an appeal.

[Syllabus by the court.]

MOTION to dismiss appeal.

J. H. Leonard, G. H. Chamberlain and L. D. Hamlin, for plaintiff.

G. A. Resek and E. G. & H. C. Johnson, for the Sheffield Land & Improvement Co.

WASHBURN, J.

This matter is submitted to the court upon motion to dismiss the appeal in this case from an order of the probate court of this county, removing L. D. Hamlin as guardian of Delia D. Wallace.

This motion is made by the Sheffield Land and Improvement Company.

It appears that Mr. Hamlin was appointed by the probate court, guardian of Delia D. Wallace, who was a very old lady, and who it is claimed has a dower interest in certain property now owned by the Sheffield Land and Improvement Company.

The Sheffield Land and Improvement Company filed a motion in the probate court to remove said guardian, upon the ground that said Delia D. Wallace was, at the time of said appointment, and for a long time previous thereto, had been, a nonresident of the state of Ohio.

Hearing was had upon that motion, and the probate court being fully advised in the premises, found that said motion was well taken, and said guardian was removed, because of the nonresidence of said Delia D. Wallace at the time of said appointment.

That order was made by the probate court on January 9, 1905. On January 27, 1905, as appears by the certificate of journal entries of probate court, L. D. Hamlin filed a written notice of appeal, and it is claimed that that appeal should be dismissed because no appeal bond was filed by said Hamlin. The notice of appeal was not signed by L. D. Hamlin, guardian, but by L. D. Hamlin.

The first question submitted is the claim of the attorneys for Mr. Hamlin, that the Sheffield Land and Improvement Company had no

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right to file said motion in probate court, and has no right to be heard on said motion in this court, because it is not a party interested in the proceedings in the probate court.

I find that under the law the Sheffield Land and Improvement Company did have a right to intervene in the probate court, and has a right to be heard in this court.

I will not stop to cite the authorities on that proposition, because that question was involved in *James Murray, In re*, a case recently decided by this court, and passed upon within the last two weeks by the circuit court.

As I have said, the Sheffield Land and Improvement Company claims that under the provisions of Rev. Stat. 6408 (Lan. 9984), this appeal was not properly perfected, because no appeal bond was filed. And it is claimed on the other side, that under the provisions of said Rev. Stat. 6408 (Lan. 9984), no appeal bond was required.

That section after providing for the filing of a bond within twenty days by the person desiring to take an appeal, provides that,

"When the person appealing, from any judgment or order in any court, or before any tribunal, is a party in a fiduciary capacity, in which he has given bond within the state, for the faithful discharge of his duties, and appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed the appeal, by giving written notice to the court of his intention to appeal within the time limited for giving bond."

It has been settled by the courts, that to relieve a person from the necessity of giving bond under this section at least two things are necessary: First, the party appealing must be "a party in a fiduciary capacity;" and, Second, he must "appeal in the interest of the trust." *Sidwell, In matter of*, 67 Ohio St. 464 [66 N. E. Rep. 521].

Even where the party appealing is a party in a fiduciary capacity, still, a bond is required where he appeals from a judgment affecting adversely his own pecuniary interests. *Collins v. Millen*, 57 Ohio St. 289 [48 N. E. Rep. 1097].

All of the cases in Ohio upon this general subject have been cases where the existence of the trust at the time of the attempted appeal has not been in question.

It is difficult to see in this case how there could be any trust created by the appointment of a guardian in a matter in which the court had no jurisdiction, because of the nonresidence of Delia D. Wallace, or how the appointment or removal of a guardian would in any way be in the interest of such a trust.

But, assuming that the act of the court did create a trust, the existence of the trust was ended by the court before Mr. Hamlin at-

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tempted to appeal, and in that event it is quite plain that under the authorities Mr. Hamlin did not appeal in a "fiduciary capacity."

The decision by the probate court put an end to the existence of any trust that might have existed before that time, and the finding of the court was, that no trust had existed, because it had no jurisdiction to appoint a guardian.

A person cannot be said to represent a trust in a fiduciary capacity, when that trust has no existence.

When the probate court removed Mr. Hamlin, he ceased to be guardian, and he could then prosecute his appeal only as an individual, and as an individual of course he would be required to give bond.

A case similar in principle, is found in *Mallory v. Railway*, 53 Kan. 557 [36 Pac. Rep. 1059]. In that case an administratrix had been appointed of the estate of a person not a resident or inhabitant of the state at the time of his death.

Later on such administratrix brought suit against a railroad company for causing the death of the intestate, and said company filed a motion to remove said administratrix, and the court determined that the company had sufficient interest in the matter to make it a competent party to institute proceedings in revocation of the letters of administration; that was done and the letters were revoked.

Appeal was prosecuted from the order revoking such letters of administration; but no bond was filed; that appeal was dismissed by the district court, and the Supreme Court, in passing upon that dismissal, used this language:

"A sufficient ground for the order of the district court's dismissing the appeal was the omission of the appellant to give an appeal bond. Under the statute, every appellant is required to file in the probate court a bond, in such sum, and with security, as may be fixed and approved by the probate court, conditioned that he will prosecute the appeal, and pay all sums, damages, and costs that may be adjudged against him. The only exception to this rule is, that no executor or administrator is required to enter into bond, to entitle him to appeal. * * * The only excuse given for the failure to give an appeal bond is the claim that the appeal was taken by the administratrix, and therefore that she was exempt from that requirement. The difficulty in sustaining that claim is, that her appointment, and everything pertaining to the administration, were utterly invalid. The probate court had no jurisdiction to grant letters of administration nor to confer authority upon her, and at the time when the attempt was made to take an appeal the letters had been recalled, and an order and decree entered declaring the administration, and all the proceedings connected with the same, null and void. In attempting to appeal, she was not acting as the representative of the estate, but was merely en-

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deavoring to obtain a personal advantage. Not being an administratrix, it was absolutely necessary that a bond should be given before an appeal could be taken, and her failure to give one is a sufficient justification for the ruling of the court in dismissing the appeal."

In the case at bar the probate court, after finding that the appointment of Mr. Hamlin was illegal because Delia D. Wallace was not a resident of the state of Ohio at the time of the appointment, made the following order:

"It is therefore ordered that the said L. D. Hamlin be, and he hereby is, removed as such guardian, and the guardianship is ordered closed according to law."

So that at the time of the attempted appeal the guardianship was closed according to law, and no trust existed, and Mr. Hamlin did not appeal in a "fiduciary capacity," and should have given bond.

There is a later case, *Coutlet v. Railway*, 59 Kan. 772 [52 Pac. Rep. 68], that is also in point. The syllabus of which reads:

"An administrator who appeals from an order of removal does not act in his representative capacity in prosecuting such appeal, and is not exempt from giving bond by the last clause of Gen. Stat. 1889. Par. 2977, providing that 'no executor or administrator shall be required to enter into a bond to entitle him to appeal.'"

In that case a son was killed, and his mother was appointed administratrix of his estate, and as such instituted an action to recover damages for the death of her son.

Subsequently the company sued by her for the death of her son, moved the probate court to revoke the letters of administration, because of the removal of the administratrix from the state. This motion was sustained.

From the order of removal the plaintiff in error appealed to the district court, which court dismissed the appeal, and from the order of dismissal by the district court, error proceedings were prosecuted to the Supreme Court, and the court in sustaining the dismissal used this language:

"When the order removing her was made by the probate court, she was no longer administratrix. Her appeal from that order was not an appeal in behalf of the estate, or in furtherance of the trust she had been filling. Her appeal was the assertion of a personal right only. There is no difference in principle between her case and that of *Mallory v. Railway*, 53 Kan. 557 [36 Pac. Rep. 1059], in which letters of administration were revoked because the original appointment was void. As said in that case, 'In attempting to appeal, she was not acting as the representative of the estate, but was merely endeavoring to obtain a personal advantage.'"

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These two cases are directly in point, and the principles announced are satisfactory to this court, and are applicable in the construction of our statute, Rev. Stat. 6408 (Lan. 9984), and finding no case to the contrary in Ohio, the order may be made in this case dismissing the appeal.

APPEAL—CONSTITUTIONAL LAW—HIGHWAYS—STATUTES.

[Clark Common Pleas, 1907.]

*CATHERINE SNYDER V. ORA MCCOLLOUGH.

STATUTE AUTHORIZING TAKING OF GRAVEL FOR ROAD PURPOSES, INVALID.

Revised Statute 4715 (Lan. 8088), authorizing the owner of lands from which gravel is taken for road purposes to appeal in the manner provided by Rev. Stat. 4699 (Lan. 8072) from the order of township trustees awarding him compensation, neither statute fixing the amount of the appeal bond nor the time within which it must be filed, fails to provide a complete method by which the owner of private property taken for a public use may have damages therefor assessed by a jury as provided by Art. 1, Sec. 19 of the constitution, and is invalid.

[For other cases in point, see 1 Cyc. Dig., "Appeals," §§ 467-482; 514-524; 2 Cyc. Dig., "Bonds," §§ 238-266; 310-348; 2 Cyc. Dig., "Constitutional Law," §§ 818-848; 4 Cyc. Dig., "Highways," §§ 20-24; 91-103.—Ed.]

[Syllabus approved by the court.]

Bowman & Bowman, for plaintiff.**J. L. Zimmerman**, for defendant.**KUNKLE, J.**

The petition in substance states that the plaintiff is the owner of certain lands in Pike township, Clark county, Ohio, upon which gravel is found in small quantities; that the defendant, pretending to act as road supervisor in said township, without any proceedings in condemnation before any body or tribunal, and against the plaintiff's objection, and without paying or securing to be paid to the plaintiff any compensation or damage, is engaged in removing gravel therefrom, without the authority of law and to the great and irreparable injury of plaintiff's lands.

The answer, in substance, after admitting that the plaintiff is the owner of the lands in question, states that the defendant is the duly elected and qualified road supervisor of said township, in road district No. 2 of said township, and was acting in such capacity in removing said gravel at the time stated in the petition; that in order to make, improve and repair the public township road running through said township near said lands, it was and is necessary for defendant to go upon said lands and obtain said gravel for the purpose of making, improving and repairing said road; that the property upon which the defendant entered at the time of the commencement of this action,

*Affirmed by the circuit court of Clark county, without report.

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then was and still is uncultivated land, not incumbered by crops, and the same is near to said road.

The plaintiff demurs to the answer on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's petition.

The defendant road supervisor claims the right to enter upon said lands and remove gravel therefrom for the purposes stated in his answer, by virtue of the provisions of Rev. Stat. 4715 (Lan. 8088). This section provides, in substance, that every supervisor shall open and keep in repair all public roads in his road district; and supervisors may enter upon any uncultivated or improved lands unincumbered by crops, near to or adjoining such road * * * and may take and carry away any gravel which may be necessary to make, improve or repair any such road, and the owner of such property so taken by the supervisor shall be paid a reasonable compensation therefor to be assessed by the trustees, and said claimant for his damages may have an appeal, as hereinbefore provided for in Rev. Stat. 4699 (Lan. 8072), and the amount found due shall be paid as provided in Rev. Stat. 4745 (Lan. 8141).

Does Rev. Stat. 4715 (Lan. 8088) create a complete procedure by which the property of the plaintiff may be taken and his damages assessed and paid, as required by law?

If the property owner's constitutional rights have been protected, then his property may be taken; if they have not, it cannot be so taken.

Revised Statute 4715 (Lan. 8088) provides that the property owner may appeal from the award assessed by the trustees, in the manner provided in Rev. Stat. 4699 (Lan. 8072).

Revised Statutes 4699 (Lan. 8072) provides, in substance, that every claimant of compensation and damages may appeal to the probate court from the final decision of the township trustees confirming the assessment of compensation and damages which appeal shall be perfected and docketed as provided in Rev. Stat. 4690 (Lan. 8063).

Revised Statute 4690 (Lan. 8063) provides that within ten days after the filing of an appeal bond or the making of an entry for an appeal, the auditor shall transmit to the probate court the original papers in the proceeding and a certified transcript upon the receipt of which the probate judge shall forthwith docket the proceedings and set a day for the hearing thereof.

When must the appeal bond referred to in Rev. Stat. 4690 (Lan. 8063), be given? In what amount shall such appeal bond be given? Revised Statute 4715 (Lan. 8088) does not attempt to fix any of these details, but refers to Rev. Stat. 4699 (Lan. 8072).

Revised Statute 4699 (Lan. 8072) refers to Rev. Stat. 4690 (Lan. 8063). Neither Rev. Stat. 4690 (Lan. 8063) nor Rev. Stat. 4699 (Lan.

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8072) fixes the time within which such appeal bond shall be given, nor the amount of the appeal bond to be given, and therefore the legislature has failed to provide a complete method by which the property owner may perfect his appeal in the probate court, and have the amount of his damages assessed by a jury, as provided by the constitution.

If Rev. Stat. 4715 (Lan. 8088) had referred to Rev. Stat. 4697 (Lan. 8070) and Rev. Stat. 4699 (Lan. 8072) instead of Rev. Stat. 4699 (Lan. 8072) alone, then we think a complete mode of appeal would have been provided.

Revised Statute 4697 (Lan. 8070) provides, in substance, how an appeal may be perfected from the final decision of the township trustees, the amount of the bond to be given by the appellant, and the time within which such bond shall be given.

None of the sections above quoted refer in any manner to Rev. Stat. 4697 (Lan. 8070). If Rev. Stat. 4699 (Lan. 8072) read that an appeal might be perfected as hereinbefore in this chapter provided, then the provisions of Rev. Stat. 4697 (Lan. 8070) would be applicable. Revised Statute 4699 (Lan. 8072), however, merely provides that an appeal shall be perfected and docketed in the manner hereinbefore prescribed in Rev. Stat. 4690 (Lan. 8063), thus limiting the reference to the provisions of that chapter to Rev. Stat. 4690 (Lan. 8063), which section does not cover the defects suggested.

Are we warranted in finding that the legislature meant to refer to Rev. Stat. 4690, 4697 (Lan. 8063, 8070) when the reference is expressly limited to Rev. Stat. 4690 (Lan. 8063) ?

The case of *King v. Cemetery Assn.* 67 Ohio St. 240 [65 N. E. Rep. 882], is similar to the case at bar.

The legislature attempted to confer upon cemetery associations the right to acquire property by condemnation, for certain purposes. The act provided that an appeal might be taken in the manner provided in chapter 4, title 6 of the Revised Statutes of Ohio. It was claimed in that case that through mistake the section read chapter 4, title 6, when it was apparent that the legislature meant chapter 4, title 7.

The Supreme Court, on page 244 of this report, say: "The intent of the legislature is determined from what it says, and if its language is clear and unambiguous, the courts have no authority to change it," and held that the act in question was invalid.

In the case of *Slingluff v. Weaver*, 66 Ohio St. 621 [64 N. E. Rep. 574], the Supreme Court say:

"The question is not, What did the general assembly intend to enact, but what is the meaning of that which it did enact? That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

Our Supreme Court has also reached the same conclusion in the

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case of *Hough v. Manufacturing Co.* 66 Ohio St. 427 [64 N. E. Rep. 521].

If the legislature has failed to provide an appeal from the award of the trustees, so that the plaintiff may have her damages assessed by a jury, as required by Art. 1, Sec. 19 of the constitution, then the statutory provisions under which the defendant is assuming to act, are invalid. *Hendershot v. State*, 44 Ohio St. 208 [6 N. E. Rep. 245], which case involves a construction of Rev. Stat. 4715 (Lan. 8088) prior to its amendment; *Reckner v. Warner*, 22 Ohio St. 275; *Lamb v. Lane*, 4 Ohio St. 167.

Revised Statutes 1482, 1483, 1484 (Lan. 2940, 2941, 2942) provide a complete plan by which the township trustees may acquire this land by condemnation, if they are unable to agree with the owner as to the compensation to be paid, but the township trustees are not attempting to proceed under these sections, to condemn this land.

It is a well-settled rule that, when public authorities seek to take private property from an individual, the law will be strictly construed in favor of the property owner.

Counsel for defendant claims that road supervisors have, for many years, acquired the necessary gravel to make and repair public roads, by virtue of the provisions of Rev. Stat. 4715 (Lan. 8088), and that to deprive them of the right to quickly appropriate the necessary materials will greatly embarrass them in the work of repairing the public roads. This may be true, but the suggestion does not assist in determining the legal question involved. This suggestion should be addressed to the legislature, rather than to the courts.

The demurrer of the plaintiff to the answer of the defendant will be sustained.

PLEADING—DAMAGES.

[Licking Common Pleas, January Term, 1907.]

ALBERT R. BADER V. COLUMBUS, B. L. & N. TRACTION CO.

1. RECOVERY CONFINED TO INJURIES AS PLEADED.

No recovery can be had for an injury that is not set out in the petition, as where, in an action for damages for being ejected from a street car, plaintiff alleges his feelings as his only injury, he cannot claim an injury to his arm as an element of compensation.

[For other cases in point, see 6 Cyc. Dig., "Pleading," §§ 373-380.—Ed.]

2. WHEN ATTORNEYS' FEES AND EXPENSES OF SUIT MAY BE RECOVERED.

To entitle a plaintiff, who has been ejected from a street car, to recover attorneys' fees and other expenses incurred by prosecuting his suit for damages, it must be alleged and shown that the ejection was done maliciously. And a request to charge that the defendant is liable for counsel fees of plaintiff's counsel—which ignores the element of malice is properly refused.

[For other cases in point, see 3 Cyc. Dig., "Damages," §§ 586-619.—Ed.]

[Syllabus approved by the court.]

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Flory & Flory and Robbins Hunter, for plaintiff.

J. R. Fitzgibbon and W. R. Pomerene, for defendant.

SEWARD, J.

The case of Albert R. Bader against the Columbus, Buckeye Lake and Newark Traction Company is submitted to the court upon a motion for a new trial.

This is an action that was tried to a jury. The plaintiff brought an action alleging in substance that he was a passenger on one of the defendant's cars in this city, and that the conductor unlawfully, forcibly, wilfully, maliciously, and insultingly and in the presence of a large number of people, refused to carry him upon its car, and ejected him therefrom, to his damage in the sum of \$300.

The case was submitted to a jury and the jury brought in a verdict of one cent damages.

The principal grounds of complaint are:

That the court erred in its charge to the jury; and in refusing to give requests which were asked to be given on the part of the plaintiff to the action.

One of the requests was, that they had a right to take into consideration in estimating the value of the damages, the injury to the arm of the plaintiff. There was no charge in this petition that he was injured in the arm, but that he was injured in his feelings. His injured feelings were the matter in controversy. The court did not think that the question of the injury to his arm could lawfully be considered by the jury, because it was not charged to be part of his injury in the petition.

It is claimed on the part of plaintiff's counsel that anything that would naturally result from the act of the defendant ejecting him from the car, was a proper matter for the consideration of the jury. If the injury to the arm would naturally result from his ejection from the car, that would be true. But is that so? Would it naturally result that his arm would be injured in being ejected from the car? As the court announced during the trial of the case, suppose his leg had been broken, and it did not charge that he was injured in that respect, but simply charged that he was simply wounded in his feelings, etc. The court does not think that that should be taken into consideration, and the court thinks that the charge was right in that regard.

Counsel for the plaintiff requested this charge to be given to the jury, and the court refused to give it:

"If the jury find that the defendant is liable to the plaintiff, the jury may allow as damages such sum as they may find reasonable as to compensate the plaintiff for his attorney fees and such other expenses as he may incur in the prosecution of this action."

Now, if this charge had gone somewhat further it might have been

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proper to have given it; but it did not go to the extent that I think the law demands that it should go in the charge to the jury. Suppose that he were unlawfully ejected from the car (and that was one of the charges in this petition) and suppose there were no other charges; suppose the charge of malice was not contained in the petition and that he was simply unlawfully ejected from the car. Would that necessarily include the right to counsel fees in the case without any malice being charged?

The charge does not say: "That if the jury find that the defendant is liable to the plaintiff, and that he was maliciously ejected from the car," but it says:

"That if the jury find that the defendant is liable to the plaintiff, the jury may allow as damages such sum as they find reasonable to compensate the plaintiff for his attorney fees and such other expenses as he may incur in the prosecution of this action."

The court does not think that that is a proper charge to be given in this case, and therefore refused it.

This motion for a new trial may be overruled and exceptions.

FALSE IMPRISONMENT—PETITION.

[Licking Common Pleas, January Term, 1907.]

SAMUEL SHANK V. ST. LOUISVILLE (VIL.) ET AL.

SUFFICIENCY OF PETITION CHARGING A VILLAGE WITH LIABILITY OF ACT OF ITS OFFICIALS.

To charge a village with the liability for the false imprisonment of one who was wrongfully arrested by the mayor and marshal, it is necessary for the plaintiff to allege, in his petition, that the said officers were acting in their official capacity when they made the arrest.

[Syllabus approved by the court.]

[For other cases in point, see 4 Cyc. Dig., "False Imprisonment," §§ 15-20; 6 Cyc. Dig., "Municipal Corporations," § 2710.—Ed.]

Russell & Horner, for plaintiff.

S. L. James, for defendants.

SEWARD, J.

The case of Samuel Shank v. Village of St. Louisville et al: This is a petition to recover damages from the village of St. Louisville and the other defendants in the case for unlawfully depriving him of his liberty. The petition states:

"Now comes the plaintiff, Samuel Shank, and for his cause of action herein, says: That he is a resident of St. Louisville, Ohio, a village duly incorporated under the laws of the state of Ohio; that E. Follett Dush was at the times hereinafter set forth the mayor of said village, and that Harvey Billman was the marshal of said village at the times hereinafter set out; that the village of St. Louisville, E. Fol-

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lett Dush and Harvey Billman, on August 5, 1906, said defendants, arrested this plaintiff and imprisoned him and unlawfully and by force deprived him of his liberty for thirty hours, on no charge and without any legal warrant or any legal process of any kind or description."

It is quite certain that the village cannot be held in this case unless these parties were acting, when they arrested him, as officers of the village; and it does not so allege. It alleges that they were officers, but not that, in their official capacity as officers, they caused this arrest to be made.

This is a motion to make the petition more definite and certain by setting out in what capacity the village caused his incarceration in the jail, and in what capacity they were acting—whether as officers or otherwise.

The court thinks that if a demurrer had been interposed to the petition, it would have been sustained; but the motion may be sustained, and leave given to amend.

CARRIERS—EJECTION OF PASSENGERS—STREET RAILWAYS.

[Franklin Common Pleas, May 1, 1907.]

PAUL JUDGE V. COLUMBUS RY. & LIGHT CO.

REASONABLENESS OF TENDER OF BILL IN PAYMENT OF FARE ON STREET CAR.

It is unreasonable for a passenger on a street car to tender a ten dollar bill to the conductor in payment of a five cent fare; and it is the duty of such passenger to leave the car promptly upon being requested to do so by the conductor, and he cannot recover for being ejected if he does not leave.

[For other cases in point, see 2 Cyc. Dig., "Carriers," §§ 671-720.—Ed.]

[Syllabus approved by the court.]

F. S. Monnett, for plaintiff.

H. A. Toland, for defendant.

BIGGER, J.

The plaintiff in this case recovered a judgment against the defendant for three hundred dollars upon the claim that he was wrongfully ejected from the car of the defendant company upon which he was a passenger. The plaintiff tendered to the conductor a ten-dollar bill in payment of his fare and the conductor informed him he could not change it and ordered the defendant to leave the car or pay his fare. The court instructed the jury as a matter of law that it was unreasonable to tender a ten-dollar bill to the conductor of a street car in payment of a five cent fare. Upon that proposition I think there can be no doubt in the absence of any showing that there was any rule

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of the company which required conductors to make change for so large a bill. There are but three reported cases in this country upon this point; in all three of them the bill tendered was five dollars and the decision in two of the three was, that it was unreasonable to tender a five-dollar bill and that it was the duty of the passenger to leave the car upon request of the conductor.

In this case I am clear that upon the evidence the plaintiff is not entitled to recover. The jury must have misunderstood the charge of the court or were influenced by passion or prejudice in arriving at the verdict they did. The plaintiff himself did not claim that there was any force used in ejecting him beyond the mere laying of his hand upon his arm or shoulder. The court instructed the jury that it was the duty of the plaintiff to leave the car promptly upon being requested to do so and that if he delayed the car the conductor would have a right to use such force as was reasonably necessary to eject him although he might state he would leave. One of the witnesses, a passenger on the car, testified that his attention was only directed to the controversy by reason of the unusual delay of the car at that point. There was no evidence to contradict this but it is entirely in accord with the evidence, as upon the plaintiff's own testimony he was having a dispute with the conductor and insisting upon his taking his fare. That being true the conductor did not exceed his rights in the premises by urging him to get off in the manner he did.

The verdict is manifestly against the law and the evidence in the case and for that reason the verdict must be set aside and a new trial granted.

CONTEMPT—DIVORCE AND ALIMONY.

[Franklin Common Pleas, October, 1906.]

MARY A. BORROR v. WATSON A. BORROR.

ONE FAILING TO COMPLY WITH ORDER TO PAY ALIMONY NOT IN CONTEMPT IF HE HAS SHOWN A DISPOSITION TO COMPLY BUT HAS BEEN UNABLE.

A husband who has been ordered to pay a sum of money down and monthly payments as alimony is not in contempt for refusing to obey the order, if it is not shown that his income during the time in question was sufficient to enable him to comply with the order, and if he shows that he attempted to raise the required amount by mortgaging his real estate, but his wife refused to join in the mortgage deed.

[Syllabus approved by the court.]

[For other cases in point, see 2 Cyc. Dig., "Contempt," §§ 45-59; 3 Cyc. Dig., "Divorce and Alimony," §§ 306-326.—Ed.]

The plaintiff, Mary A. Borrer, caused the defendant, Watson A. Borrer, to be arrested on September 18, 1906, for contempt of court in failing to pay temporary alimony which alimony was ordered on June 2, 1906, as follows: \$250 payable immediately and the further sum of

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\$50 per month, payable on the last day of each and every month. Plaintiff received on said order the sum of \$154.90. The defendant, answering, said that he had turned over to the defendant all of his personal property; that he had no moneys nor securities of any kind or character, and that he had offered to sell or mortgage his real estate for the purpose of obeying the orders of the court, but that the plaintiff refused to join in a deed or mortgage.

Lentz, Fritter, Belchor & Conner, for plaintiff.

C. I. Saviers, for defendant.

EVANS, J.

The evidence shows that defendant for the period covered by this inquiry—about three months from the latter part of June to date, had following income:

Room over saloon at \$8 per month for three months.....	\$ 24 00
Shadesville property at \$108, \$60 and \$30 per year—three mos.	49 50
Third street property \$27 per month for three months.....	81 00
	<hr/>
	\$154 50
On August 10, he received for wheat sold.....	207 05
	<hr/>
	\$361 55
July 25, paid taxes	\$ 78 05
Saloon rent, three months	150 00
Keep of self, which he puts at \$3.50 per week, three months....	42 00
	<hr/>
	\$270 05

Defendant claims he lost between \$400 and \$500 on the Immel contract; says he cannot tell what profit he has in Scibto dam contract; that he owes for lumber, work, also for cement and hardware. Miller says the profit will be about \$150. Until that is settled, it could not be taken into consideration here as the profit would not have been realized during the period of time under inquiry. There was also a contract on market house for \$17.

This would show a margin of something over \$100 in receipts above expenses.

I am not able to determine from the evidence whether the saloon did or did not make a profit, or lost money.

Defendant says that since this suit, the saloon has lost money; that he lost trade. And there is no evidence conclusive to show that it made a profit.

The fact that the sheriff was not able to sell the part thereof levied

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on the execution would tend to show that it was not a profitable concern.

While there is some evidence tending to show that the barkeeper started reports that the property would not be sold on the execution, yet, this is not traced to defendant, nor, is it entirely sufficient to explain why it would not have sold on a repeated effort to that effect if made, if it was a valuable concern.

So that it may be, so far as the evidence goes, as the defendant claims, that part of this income above went to pay rental for the saloon.

Another matter that is complicated by the evidence is the outcome of the Immel contract. Defendant claims he lost \$400 or \$500 on that contract; and the evidence does not dispute that. At least, there is no evidence to show the exact state of that account. And I am not prepared to say from the evidence but that there may have been a loss on that contract, and that money from the above sources may have, in part at least, been lost on that contract. Miller testifies that defendant owes several men who worked for him, including himself, and also material men.

It may be, so far as the evidence discloses, that the money which he might otherwise have applied on the order, was lost on the Immel contract.

One thing the court must take into consideration in charges of this character is, whether the party charged has or has not manifested a disposition to obey the order, or to disregard it.

The defendant in this case turned over all the personal property to plaintiff; and also left her in possession of the household goods. Substantially all this has been sold except the household goods, but unfortunately it did not sell for enough to satisfy the amount required by the order.

In addition, the evidence shows that defendant made some efforts to borrow money to pay this alimony, but did not succeed.

He also offered to encumber some of his real estate for this purpose, but plaintiff refused to agree to this, and he was thereby unable to mortgage any real estate for a loan.

These efforts on the part of defendant tend to show a disposition on his part to comply with the order.

The real estate that he owns renders him amply able to raise the money and pay the alimony. According to the evidence the real estate is worth about \$15,000 with mortgage encumbrances of about \$2,500. He has some debts in addition, but the later are not now encumbrances on the real estate.

So that he is amply able to pay this alimony. But the court cannot find him in contempt for not paying the alimony out of his real

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estate, because he offered so to do but plaintiff refused to have the money raised in this manner.

By encumbering the real estate it would not be necessary to raise a fund in addition to that necessary to comply with the order. Hence, in so doing, the defendant would not necessarily realize a fund for himself out of the real estate.

Orders for the payment of alimony are strictly enforced by our courts, and when one is in contempt for nonpayment under such an order, he must sustain the punishment provided by law.

But if his failure to pay the alimony and comply with the order is because of want of money on his part so to do and he has made a reasonable and diligent effort to comply and he is not at fault for such failure, then, while he still remains under the obligation under the order, yet he could not be held in contempt of court.

The failure of the evidence to show that said saloon earned a profit during said period of time; and failure to show that the Immel contract was at a profit rather than a loss, and that thereby the residue of said income from rents, etc., after paying necessary expenses, may have been eaten up in that business and that contract, do not satisfy the court that the defendant, from said sources, could have paid this alimony. And his efforts to raise the money and pay it from an encumbrance on the real estate tends to show that he was not without a disposition to obey the order.

For the above reasons, I am of the opinion that the charge of contempt is not supported by the evidence.

The defendant is, therefore, discharged from said contempt proceedings.

Exceptions.

Coal & Coke Co. v. Pocahontas Co.

ATTACHMENT—CONTRACTS—FACTORS.

[Superior Court of Cincinnati, General Term, 1906.]

Ferris, Hosea and Hoffheimer, JJ.

LOUISVILLE COAL & COKE CO. v. POCAHONTAS CO.

GREENBRIER COAL & COKE CO. v. POCAHONTAS CO.

1. CONTRACT BY WHOSE TERMS FIRM MADE "SOLE AGENTS" TO SELL COAL ON PER CENTAGE COMMISSION AT PRICES FIXED BY PRINCIPAL, COAL TO BE IN THE NAME OF AGENT, PAYMENTS TO BE GUARANTEED, AND SELLING CHARGES PAID BY AGENT, MAKES LATTER *DEL CREDERE* FACTOR AND COAL PROPERTY OF PRINCIPAL.

A partnership, doing business with a coal company under a contract, by the terms of which the partnership is denominated the "selling agents" of the company, coal is shipped in the name of the partnership, sold by them, taxes paid on coal on hand and advances on shipments and selling charges paid by the partnership, and payment on sales guaranteed, but sales made at prices fixed by the company and compensation to the partnership fixed at a percentage commission on sales made, stands to the coal company in the relation of a *del credere* factor and holds the coal as the property of the company.

2. ATTACHMENT DISMISSED IF PROPERTY NOT REDUCED TO POSSESSION BY COURT, ALTHOUGH NOTICE AND WRIT DULY SERVED.

Coal held by a *del credere* factor of a nonresident is subject to attachment in this state in the hands of the factor, but an attachment accompanied by notice of garnishment properly served but not accompanied by a reduction to possession of the coal by an officer of the court is not complete and a motion to dismiss will be sustained.

[Syllabus approved by the court.]

RESERVED from special term on motions to dismiss attachments.

Drausin Wulsin and F. O. Suire, for plaintiffs.

Herron, Gatch & Herron, for defendants.

HOSEA, J.

By the act of 52 O. L. 36 (Rev. Stat. 493; Lan. 789) this court is given jurisdiction of actions brought against a nonresident of this state or a foreign corporation where property of, or debts owing to, the defendant may be found in the city of Cincinnati.

These suits are brought against a foreign corporation, and the primary question involved in these motions arises upon the validity and effect of a garnishment served upon a partnership composed of nonresident partners doing business within the jurisdiction of the court.

It may be premised as a cardinal principle that the jurisdiction of the court in suits against nonresidents depends upon and is limited in extent to property taken into custody upon attachment proceedings duly had. The suits therefore become, essentially, proceedings *in rem*. *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 545, 556 [57 N. E. Rep. 446; 78 Am. St. Rep. 743]; *Oil Well Supply Co. v. Koen*, 64 Ohio St. 422, 429 [60 N. E. Rep. 603]. The fact that such property, subject to gar-

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nishment, exists in the hands of the garnishee, must be found before the suit in attachment can proceed to final judgment. *Meyers v. Smith*, 29 Ohio St. 120.

It is a settled principle also that in proceedings depending not upon natural right but upon statutory authority solely, the conditions imposed by the statute as the basis of remedial action must be complied with. Attachment laws are therefore strictly construed as against the party seeking their enforcement. *Cook v. Engine Works*, 10 Circ. Dec. 236 (19 R. 732); *Endel v. Leibrock*, 33 Ohio St. 254.

In the case at bar the summons issued January 8, 1903, is returned "not found," and an order of attachment January 8, 1905, is returned indorsed:

"1903, January 8. No goods or chattels, lands or tenements found to attach, and I have this day served Castner, Curran & Bullitt with a true copy of this writ and notice to garnishee by leaving the same at the usual place of business of said partnership and with H. R. Mather, manager of said firm, personally, at 11:55 o'clock, and have summoned them to appear and answer as required by law."

The statutory basis for service upon garnishee is an affidavit describing the property coupled with the inability of the officer to get possession of the same. Revised Statute 5530 (Lan. 9059). If the garnishee be a partnership, service may be made by leaving a copy of the order and notice to the garnishee to appear in court and answer, at the usual place of doing business, etc. Revised Statute 5534 (Lan. 9063). It is further provided that the garnishee shall stand liable to the plaintiff in attachment for all property of the defendant in his hands and money and credits due from him to the defendant from the time he is served with the written notice mentioned in Rev. Stat. 5530 (Lan. 9059). Revised Statute 5538 (Lan. 9067).

Incidentally it has been held that the service holds only such property as is at the time in the hands of the garnishee. *Rice v. Farnham*, 4 Dec. 217 (7 N. P. 189).

The question here then is a jurisdictional one, namely: Is there property or are there credits lawfully in the custody of the court by virtue of the proceedings had in this case?

So far as concerns the objection that a garnishment proceeding will not lie against the property or credits of a nonresident debtor, as intimated in a dictum in *Root v. Davis*, 51 Ohio St. 29 [36 N. E. Rep. 669; 23 L. R. A. 445], it seems to be conclusively answered to the contrary by Judge Saylor in a case decided by him when on the bench of the common pleas. See *Goebel v. Bank*, 4 Dec. 127 (3 N. P. 109).

The garnishee has filed no answer; but, under the order of the court, H. R. Mather, the local agent of the garnisheed firm, appeared

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before a referee and admitted the service of garnishee process and claimed ignorance of any relation of indebtedness of the firm represented by him, and that no account with the Pocahontas Company existed on his books, that his custom was to deposit all collections from sales in bank here to the credit of Castner, Curran & Bullitt, Philadelphia, excepting a small amount reserved as an agency fund.

Upon a subsequent examination he could not answer as to amount of coal on hand on January 8, 1904, as his books had all been sent to the head office in Pennsylvania since his first examination, and he refused to request their return; but upon the order of the referee, however, he subsequently testified that he had done so but the firm declined to send the books or give any information.

In support of the motion to dismiss the attachment, the defendant files affidavits of Tierney, president, and Goodwill, secretary, of the Pocahontas Company; and of Castner, of the garnisheed firm, claiming in substance that the parties are all nonresidents of Ohio; that Castner, Curran & Bullitt owe nothing to the Pocahontas Company; that the Pocahontas Company has no property in Ohio; that the Castner, Curran & Bullitt firm was not formed to do business in Ohio, and never had any property of the Pocahontas Company in its possession in Ohio, and has no contract with the Pocahontas Company made or to be performed in Ohio.

Against the motion, the plaintiff presents, in addition to the testimony of Mather before the referee, affidavits of Justus Collins, president, Javius Collins, secretary and treasurer, and J. S. Jameson,—all of plaintiff company and H. W. O'Keefe, agent at Bluefield, West Virginia, of the Smokeless Fuel Company, all of whom say that the Pocahontas Company buy the output of the collieries mining Pocahontas coal and employs Castner, Curran & Bullitt as its exclusive selling agent. They detail the method of business by which the agents sell and distribute the coal to purchasers through the various branches of the firm in the United States and elsewhere; and aver that the firm sells an average of about ten thousand tons per month in and near Cincinnati; and attach schedules showing the exact quantities shipped to Castner, Curran & Bullitt at Cincinnati from December 1, 1903, to January 8, 1904. They assert, on the basis of these figures, that Castner, Curran & Bullitt were indebted on January 8, 1904, for coal shipped and not yet paid for, about \$40,000.

By way of rebuttal, affidavits of Tierney and Mather are presented. The former, having read the preceding affidavits, denies that the coal of the Pocahontas Company was sold by Castner, Curran & Bullitt and declares that it became the property of Castner, Curran & Bullitt when loaded at the mine tipples, and denies that the Pocahontas Company ever shipped any coal to Castner, Curran & Bullitt at Cincinnati or to

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its customers. He attaches a copy of the contract between the Pocahontas Company and Castner, Curran & Bullitt governing their relations, claiming that it was made and its provisions carried out in West Virginia. He details the operations and procedure under the contract, claiming that Castner, Curran & Bullitt are purchasers of the coal in West Virginia, and that it then and there becomes their property at an agreed price "subject to readjustment" according to the ultimate selling price, and that Castner, Curran & Bullitt "assume all risk and pay all incidental charges," "but the Pocahontas Company holds Castner, Curran & Bullitt immediately responsible for the price of its product agreed upon as aforesaid." He says that settlements are made each month with Castner, Curran & Bullitt, of Philadelphia, and that the Pocahontas Company have no dealings with local agents of Castner, Curran & Bullitt.

Mathers avers that he keeps no accounts with the Pocahontas Company, and claims that Castner, Curran & Bullitt are sole owners of the coal; that they insure it as their own in their bins and pay taxes on it. He attaches copies of the tax returns made by him as the local agent of Castner, Curran & Bullitt from 1898 to 1904 inclusive, showing an average return of about \$12,000 in average value of coal on hand.

It will be manifest from this testimony that the effort of defendants is directed to asserting in various forms that the legal relations of the firm of Castner, Curran & Bullitt to the Pocahontas Company are those of purchaser towards the seller and not those of agency, as originally claimed by Mather. It is true that where the terms of a contract between parties are obscure or uncertain the practical construction which the parties themselves have put upon it will have great weight with a court in determining its meaning and legal effect; but where the parties have put their contract in writing, resort must be had in the first instance to the writing, and if its terms are clear and there is nothing uncertain as to its meaning, there is no occasion to resort to extraneous aids in its interpretation. This is the more necessary because acts are often equivocal and may be equally consistent with one or the other of the two theories of relationship of parties—and this is true of much of the testimony here.

In the present case, however, the contract itself refers throughout to "agents" and "sales agents;" and while this fact of itself is not conclusive, the context adds to its significance, as will appear from the following extracts, in which we italicize certain words and phrases:

1. The party of the first part agrees to constitute and appoint the parties of the second part its *sole agents* during each and every year of the life of this agreement *to sell coal for the party of the first part. The prices and terms of sale shall be determined from time to time by the party of the first part, etc.*

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2. The party of the first part agrees to pay to the parties of the second part and the parties of the second part agree to accept as *their commission on sales of coal made by them as such agents* the following amounts (percentages of net selling price f. o. b. Norfolk, etc.). * *

* *Parties of second part agree to accept said commission upon the condition that they shall be employed as the sole and exclusive sales agents, etc.* * * *

3. (More references to "selling agents" and provisions for liquidation of damages in cases of breaches.)

4. (Ditto.)

5. Castner, Curran & Bullitt guarantee to take charge of inspections, shipments and delivery, collection of bills, and pay charges and to pay on the fourteenth of each month proceeds of all coal passing weigh scales of N. & W. R. R. during preceding calendar month, etc.

6. *To keep accurate books of account of all transactions as such agents * * * open to inspection of Pocahontas Company, and render account of sales each month and prices obtained.*

In a word, the entire purpose and effect of the contract in question was to constitute the firm of Castner, Curran & Bullitt selling agents of the Pocahontas Coal Company. The plain import of the language employed is to create the relation of factor, under a *del credere* commission—an agency pure and simple, with clearly defined limitations of power and equally clear obligations of accountability. Castner, Curran & Bullitt are (1) to sell for the Pocahontas Company; (2) to collect and guarantee payments; (3) to render an account of sales and remit proceeds; (4) to make advances on shipments; (5) cover expenses of selling; (6) to sell at prices fixed by Pocahontas Company; (7) and to receive as compensation a percentage on sales. All these are consistent only with the relation of agents, and are entirely inconsistent with the relation of purchasers.

The case is in some respects similar to that of *Willcox & Gibbs Sew. Mach. Co. v. Ewing*, 141 U. S. 627 [12 Sup. Ct. Rep. 94; 35 L. Ed. 882], where the contract gave Ewing exclusive rights of sale in certain territory at prices fixed by plaintiff; required him to purchase \$20,000 worth of machines during the year, 1875, and to maintain regular retail rates, and defendant bought of the company the agency property and leased from them the building required to do business. The court—Justice Harlan—held that the contract was one of agency and terminable at the will of the principal, subject to existing contracts made by agents.

The case of *White, Ex parte*, L. R. 6 Ch. 397, relied upon by the movers here has no application. The controlling feature in that case was the fact that the purchasing party was accountable only for a fixed purchase price and was entirely untrammelled as to his selling price—his compensation being a profit and not a commission.

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Tested by well-established principles, the contract in the present case provides for nothing more than incidents of a *del credere* agency; a factor under a contract guaranteeing the price of goods sold is none the less an agent occupying a fiduciary relation to his principal. *Bering v. Corrie*, 2 Barn. & Ald. 127.

Other matters shown in the affidavits and relied upon as proving a relationship of purchaser rather than agency, are within the usual incidents of a *del credere* agency. A factor under such a commission may not only sell in his own name, but for many purposes as to third parties be regarded as the owner. He has, in fact, a special property in the goods by virtue of his lien for advances and commissions. *Haebler v. Luttgen*, 61 Minn. 315 [63 N. W. Rep. 720].

While he may insure in his own name (*Johnson v. Campbell*, 120, Mass. 449); sell in his own name, and even sue in his own name for the selling price, nevertheless the title to the goods remains in the consignor until sold. *Barnes Safe & Lock Co. v. Tobacco Co.* 38 W. Va. 158 [18 S. E. Rep. 482; 22 L. R. A. 850; 45 Am. St. Rep. 846].

See generally: *Witkowski v. Harris*, 64 Fed. Rep. 712; *Morris v. Cleasby*, 4 Maul. & Sel. 566, 574; *Grove v. Dubois*, 1 T. R. 112; *Gould v. Lee*, 55 Pa. St. 99; *Cushman v. Snow*, 186 Mass. 169 [71 N. E. Rep. 529].

The relation of the firm of Castner, Curran & Bullitt to the Pocahontas Company being that of agency, the coal on hand on January 8, 1903, in the yards of Castner, Curran & Bullitt was the property of the Pocahontas Company, subject to whatever lien existed in favor of Castner, Curran & Bullitt for their advances and unpaid commissions. For like reasons the firm of Castner, Curran & Bullitt were not debtors of the Pocahontas Company in respect of moneys due, in the ordinary sense, because their relation as factors was a fiduciary one.

No reason appears, therefore, why the officer holding the writ of attachment could not have levied the same upon the coal in the yards, because it is admitted that coal was there in large quantities in possession of Castner, Curran & Bullitt under its contract relations with the Pocahontas Company—which we find to have been the property of the Pocahontas Company. *Davis v. Lewis*, 8 Circ. Dec. 772 (16 R. 138).

Under these circumstances, it is manifest that the plaintiff in attachment has failed by the proceedings thus far taken to secure a proper anchorage for the jurisdictional power of the court, which, in these cases, as already shown, depends upon an actual bringing of tangible property *in custodia legis* through strict observance of the means pointed out by statute.

The motions will be granted and the attachments dismissed, but without prejudice.

Ferris and Hoffheimer, JJ., concur.

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CONSENTS—STREET RAILWAYS.

[Cuyahoga Common Pleas, October 26, 1906.]

*TAYLOR EMERSON V. FOREST CITY RY.

CONSENT OF MAJORITY OF ABUTTING OWNERS TO GRANTING OF FRANCHISE MAY INCLUDE CONSENT OF CITY AS ABUTTING OWNER.

That the written consent of a majority of the ownership of abutting property on a proposed street railway must be obtained is jurisdictional to the council in granting the franchise. But the city, as owner of a portion of the abutting frontage for park, cemetery or other purpose, may grant its consent and have its property counted in to complete the necessary majority although it must act also as the grantor of the franchise. This is the reasonable construction to be placed on this statute covering the majority consent, as well as the construction which members of the legal profession have put upon it and in which the city authorities have acquiesced.

[Syllabus approved by the court.]

Squires, Sanders & Dempsey, for plaintiff.

Garfield & Westenhaver, for defendant.

BEACOM, J.

The facts are not in dispute between the parties hereto. The plaintiff, Emerson, is the owner of a parcel of land abutting on Brownell street, in the city of Cleveland, between Euclid and Central avenues. On September 24, the council of the city of Cleveland passed an ordinance granting defendant, the Forest City Railway Company, the right to construct and operate a street railroad in Brownell street between Euclid and Central avenues. Said ordinance was lawfully approved by the mayor and published and accepted by the grantee. The defendant, the Municipal Traction Company, has acquired by lease all the rights of the Forest City Company under said ordinance.

There abuts upon said street between the points named, a cemetery, the Erie street cemetery, the property of the city of Cleveland, with a frontage of 363 feet. The written consent of the city of Cleveland as a property holder of abutting property was obtained previous to the granting of the ordinance. If this city property frontage be counted as consenting, then a majority of the property holders abutting on the street had consented to the granting of this franchise. If it be not counted the granting ordinance is invalid.

The issue, then, between the parties hereto is one of law. Original Rev. Stat. 2502 (see Lan. 3764; B. 1536-185) requires that previous to the granting of a franchise to construct a street railway there shall have been obtained "the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting upon

*Affirmed, on appeal, *Emerson v. Railway*, 28 O. C. C. 000.

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the several streets along which said road is proposed to be constructed." The obtaining such consents is jurisdictional, and the council has no power to grant a franchise until such consents have been so obtained.

Plaintiff says that the 363 feet belonging to the city of Cleveland should not be counted as consenting; that the statute was intended to protect private property owners from oppression by the city council; that the city was not contemplated as one of the property holders whose consent could be counted; that the council have no jurisdiction of the subject-matter until a majority of the frontage has consented; that in this case, if jurisdiction was acquired by the council at all, it was acquired from itself and not from abutting property owners. This, then, is the only question that the court is called upon to decide: Should the property belonging to the city of Cleveland be counted as part of the consenting frontage?

1. I have already referred to the language of the statute. It requires the consent of a majority of the property holders represented by the feet front of abutting property. The language is simple and unequivocal and in its terms appears to include all property holders upon each street or part thereof. The language seems clear that when the consent of a majority in frontage has been obtained the council has power to grant a franchise—has jurisdiction.

2. In the second place, it is undisputed that such has been the construction placed upon this statute ever since its enactment, that such frontage should be counted, and it is a rule of law, as stated by Chancellor Kent, that "in the construction of statutes the construction which members of the legal profession put upon them is deemed of some importance." Not only has the legal profession by its acquiescence put this construction upon it, but such has been the construction put upon it by all persons called upon in any way to apply the provisions of that section, and it is said, in *Edwards v. Darby*, 25 U. S. (12 Wheat.) 206, 210 [6 L. Ed. 603], that,

"The contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

Counsel for plaintiff are, of course, right, that the question has never been directly raised or passed upon by a court, and that acquiescence does not amount to a decision of the question, because the question has never been heretofore directly raised. But counsel for defendant are equally right, that the fact that no person has ever apparently raised this question heretofore does carry with it some weight, much weight, in favor of the defendants.

3. Passing now from the express language of the statute and from the fact of acquiescence in a construction adverse to plaintiff's claim, let us consider the question on principle. The council of a municipality

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is given by the legislature control over city highways. Without this statute, original Rev. Stat. 2502 (Lan. 3764; B. 1536-185), the council might grant a franchise to construct a street railway in a street without the consent of an abutting property owner, but in order to protect the abutting owner from oppression by public authorities the legislature has required that before the council acquires jurisdiction to grant a franchise a majority of the abutting property holders must assent thereto. This is limiting the general public in its control over highways and is placing a veto power in the abutting property owners. I do not think the statute giving that power to the individual owner along a highway should be liberally construed in favor of the individual owner and strictly construed against the power of the public speaking through its public officers. If the contention of plaintiff be true, we might find in some cases, where the city owns large frontages, that a small number of persons with a limited frontage would be able to prevent the construction of street railways over long routes. The city might own parks and cemeteries and public grounds on one or both sides of a route, and a small number of abutting owners representing a small frontage might control the building of a street railway in a long public highway. I am not of opinion that the legislature ever intended to make a grant to abutting owners which could by any possibility work out such results. I am of opinion that all that can be claimed under this statute is, that the consent of a majority of property holders, that is, of all property holders, must be had; that when a consent is obtained from property holders owning a majority of the abutting frontage, whether the municipality be one of the consenting abutting owners or not, the council does have jurisdiction to act.

This seems clear to me for the three reasons given. I do not hesitate to refuse this injunction and dismiss the petition. Plaintiff excepts:

INTOXICATING LIQUORS—VENUE.

[Licking Common Pleas, March, 1906.]

GEORGE W. GARRISON v. STATE OF OHIO.

1. IN A PROSECUTION OF PHYSICIAN FOR GIVING PRESCRIPTIONS FOR WHISKY IN VIOLATION OF BEAL LAW, CONVERSATION AS TO USE FOR WHICH WHISKY INTENDED, NOT COMPETENT, IN ABSENCE OF PHYSICIAN.

In the prosecution of a physician as an aider and abettor in the sale of intoxicating liquors in violation of the Beal law, in that he gave prescriptions for whisky, to be filled at a drug store, it is error to admit as evidence a conversation between the purchaser and the proprietor of the drug store as to the use for which the whisky was intended, which conversation was had in the absence of the physician.

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2. NO PROVISION FOR CHANGE OF VENUE FROM MAYOR'S COURT IN TRIAL FOR VIOLATION OF BEAL LAW.

There is no provision in the statutes as to the disqualification of a mayor from trying a case for violation of the Beal law, nor for change of venue, and he is not disqualified from trying the case even though he may have furnished the money to hire a detective to obtain the necessary testimony and though he may previously have formed an opinion as to the merits of the case.

3. JUDGMENT NEED NOT FOLLOW IMMEDIATELY IN CRIMINAL CASE BEFORE MAYOR.

In the trial of a criminal case before a mayor, it is not necessary that judgment follow immediately after the trial and submission for decision, as in the case of civil actions before magistrates.

[Syllabus approved by the court.]

ERROR to mayor's court.

G. C. Daugherty, for plaintiff in error.

P. B. Doty and J. R. Fitzgibbon, for defendant in error.

SEWARD, J. (Orally.)

The case of George W. Garrison v. State of Ohio is submitted to the court upon a petition in error. There are two cases. The errors complained of are quite numerous. I believe they are the same in each of the cases.

Dr. Garrison was charged with selling intoxicating liquors in a dry town, under the Beal law; and while it is not claimed that the doctor sold the liquors directly, it is claimed that he was guilty under Rev. Stat. 6804 (Lan. 10400) as an aider and abettor, and therefore is a principle in the offense.

The testimony shows that the doctor gave prescriptions to parties, one in each case, for intoxicating liquors; that the parties went to the drug store and had the prescriptions filled. I believe the testimony shows that it was half a pint in each case. It is claimed that the prescriptions were not given in good faith.

The errors complained of are:

That the mayor erred in the admission of improper and incompetent evidence offered on behalf of the state of Ohio.

That the mayor erred in the exclusion of proper evidence offered by defendant below.

That the mayor erred in overruling the demurrer of defendant below to the affidavit in said case.

That the mayor erred in overruling the request of defendant below for a jury trial of said case. But the Supreme Court has passed upon that, and it is sufficiently well indicated to counsel that it is the law of the state of Ohio.

That the mayor erred in overruling the motion of defendant below for a new trial.

That the mayor was disqualified from trying said case for the rea-

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son that he had employed and paid the witnesses on whose testimony alone conviction was had.

That the judgment and sentence of said mayor is against the law of the case.

That the judgment and sentence of said mayor is against the evidence in the case and manifest weight thereof.

That there is no evidence whatever to sustain said judgment and sentence.

That the said mayor was without jurisdiction to try said case by reason of his connection with same before it was put on trial.

That the mayor was without jurisdiction to decide said case on December 19, for the reason that the date of said decision was ten days from the date of the trial of said case and the submission of the same to said mayor for decision.

That the trial of said case before said mayor was not due process of law, and contrary to law of the land.

Other errors apparent upon inspection of the record.

Now, in relation to the admission of improper evidence in this case, the court is confronted with this state of facts, as shown on page 4 of this bill of exceptions.

One of these detectives testified that he went to the doctor and got a prescription; the prescription was introduced in evidence; that afterwards, he went to the drug store—not with the doctor; the doctor was not along at all—and he gives a conversation between himself and the druggist in the absence of the doctor. Now, that certainly was clearly erroneous, to permit that kind of testimony to go to the court. There is no question about it, and there cannot be any question about it, I think. A motion was made to strike it out, and the motion was overruled by the court.

Now, one of the essential points to establish in the case was the sale of this liquor: that the sale was made by the druggist, at the drug store, and the conversation is given there, and that is the only evidence that would tend to hold Dr. Garrison liable or connect him with the case. The testimony was given of the conversation between this druggist and the witness. He says:

“I went to the drug store, and handed him the prescription; Mr. Reese asked me what kind I wanted, and I said I wanted the best; I never drink anything but the best; I want something to liven up on.”

Motion by Mr. Daugherty to rule out the conversation with Reese because Dr. Garrison was not present. Motion overruled and exceptions.

The court thinks this is clearly prejudicial error in these cases.

I do not think there was any error in the exclusion of proper evidence. I do not find that there is any error in the court overruling the demurrer. The affidavit was certainly sufficient under the statute known

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as the Beal law; and there was no error in overruling the demand of the defendant for a jury trial. The court having passed upon these features of the case in the Schlagel case, will not take up any time in discussing them.

As to the question of the disqualification of the mayor in this case: I think, under the statutes of Ohio, if the mayor would not try it, there could be no trial at all. There is no provision for a change of venue, and no provision for anybody sitting in his place in the statutes of Ohio, so far as the court has been able to determine. It doesn't matter what his opinions were in the matter, or what he had done before; he is not disqualified by the statutes of Ohio, so far as I am able to determine or ascertain, and counsel have not furnished the court with any authority. The testimony shows that the mayor furnished his check to pay this detective, but that would not disqualify him from sitting in the case. An affidavit of prejudice was made, but what was he to do with it? What could he do?

It is not necessary to go further in the case. The court finds that there was error in the refusal of the mayor to strike out the testimony of the detectives as to the conversation had out of the presence of the doctor, and the judgments in both cases will be reversed and remanded for a new trial.

By Mr. Daughtery: I want exceptions to the order remanding the cases back for new trial.

The Court: Very good.

By Mr. Daughtery: Because I claim that, by delaying eleven days to decide, the mayor lost jurisdiction of the cases entirely.

The Court: Intended to refer to that. While that is the case in civil cases, the court does not find any provision of the statute on that subject in criminal cases, holding that the mayor must decide a case at once. There is a provision as to civil cases, but whether that applies to criminal cases, I do not say.

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RAILROADS—TAXATION.

[Superior Court of Cincinnati, General Term, 1906.]

Ferris, Hosea and Hoffheimer, JJ.

CINCINNATI, N. O. & T. P. RY. v. RUDOLPH K. HYNICKA, TREAS.

1. ROADBED AND OTHER REALTY NECESSARY TO DAILY OPERATION OF ROAD MADE PERSONALTY AND VALUE DISTRIBUTED PROPORTIONALLY FOR TAXATION.

Revised Statutes 2772 (Lan. 4114), in the sections covering the taxation of railroad property, makes the roadbed and other realty necessary to the daily operations of the road personality for the purposes of taxation, and in Rev. Stat. 2776 (Lan. 4118) the words, "such property," refer back to this section and provide that this personal property of railroads situated partly within and partly without the state shall be distributed proportionally according to the length of the whole line and the proportion within this state.

[For other cases in point, see 7 Cyc. Dig., "Taxation," §§ 528-533.—Ed.]

2. BRIDGE USED SOLELY TO SUPPORT TRACK OF RAILROAD IS ROADBED AND TAXABLE AS SUCH.

A bridge over a river, built and used solely for the purpose of supporting railroad tracks and being part and parcel of the road and necessary to its daily running operations is "roadbed" for purposes of taxation, and is not to be taxed locally, although there may be a small footpath at the side, built by the owners of the road. *Cowen v. Aldridge*, 14 O. F. D. 21 (114 Fed. Rep. 44) distinguished and not followed.

3. REVISED STATUTES 2776 (LAN. 4118) CREATES NO EXEMPTIONS FROM TAXATION AND IS CONSTITUTIONAL.

Revised Statutes 2776 (Lan. 4118), interpreted to mean that the "such property" mentioned therein refers to the "roadbed and other realty necessary to the daily running operations of the road" referred to in Rev. Stat. 2772 (Lan. 4114), does not create an exemption from taxation in favor of property not necessary for the road's daily running operations, and is not, therefore, unconstitutional.

4. LAND ON WHICH SIDE TRACKS AND SWITCHES ARE BUILT AND LOTS BOUGHT FOR THE PURPOSE OF MAKING CONNECTION WITH ANOTHER ROAD ARE RIGHT-OF-WAY FOR TAXATION PURPOSES.

The lots and portions of streets over which side tracks, switches, and turn-outs are built are to be considered as portions of the right-of-way and realty necessary to the daily running operations of the road and not separately taxable. Nor are lots bought for the purpose of making connection with another railroad, although the fill necessary has not been made nor the tracks laid, to be taxed separately, but proportionally with the whole line.

[For other cases in point, see 7 Cyc. Dig., "Taxation," § 217.—Ed.]

5. AUDITOR MAY NOT ADD TO DUPLICATE RAILROAD PROPERTY ALREADY ASSESSED ON THE THEORY THAT IT IS PROPERTY LOCALLY TAXABLE.

A county auditor who places upon his duplicate property already returned by the railroad for taxation and the taxes thereon paid, on the theory that such property is taxable locally in his county, acts without authority, as such property is not omitted property and Rev. Stat. 2781a (Lan. 4159) gives him no power to reassess or revalue property already legally valued and assessed.

6. WHETHER "REALTY" REQUIRES STRICTER LIMITATION THAN "TRACKS," ETC., QUARE.

Do not the words of our statute, "realty necessary to the daily running operations of the railroad," make a stricter limitation than the statutes

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of other states, which include "tracks," "main tracks," and "right of way," so that switch tracks and yards used for storage of cars would fall without the limitation in Ohio?—*quaere*. Hosea, J.

[Syllabus approved by the court.]

INJUNCTION.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff:

The bridge of the Cincinnati Southern railway over the Ohio river is a part of the roadbed of the railway, has been assessed and taxed as such, and is not subject to be again separately assessed or taxed either as a bridge or as a structure. *Pittsburgh, C. & St. L. Ry. v. Bridge Co.* 131 U. S. 371 [9 Sup. Ct. Rep. 770; 33 L. Ed. 157]; *State v. Railway*, 97 Mo. 348 [10 S. W. Rep. 436]; *Anderson v. Railway*, 117 Ill. 26 [7 N. E. Rep. 129]; *People v. Railway*, 206 Ill. 252 [68 N. E. Rep. 1059]; *People v. Railway*, 215 Ill. 177 [74 N. E. Rep. 116]; *St. Louis & S. F. Ry. v. Williams*, 53 Ark. 58 [13 S. W. Rep. 796]; *State v. Mutchler*, 41 N. J. Law 96; *Schmidt v. Railway*, 24 S. W. Rep. 547 (Tex. Civ. App.); *Chicago, St. L. & N. O. Ry. v. Commonwealth*, 115 Ky. 278 [72 S. W. Rep. 1119]; *Henderson Bridge Co. v. Henderson*, 90 Ky. 498 [14 S. W. Rep. 493]; *Dayton, H. & B. Ry. v. Lewton*, 20 Ohio St. 401; *Union Pac. Ry. v. Hall*, 91 U. S. 343 [23 L. Ed. 428]; *Virginia & T. Ry. v. Washington Co.* 71 Va. (30 Gratt.) 471; *Missouri River, Ft. S. & G. Ry. v. Morris*, 7 Kan. 210; *Covington & Cincinnati Elevated Ry. & Transfer & Bridge Co. v. O'Meara*, 19 Ky. App. 1438 [35 S. W. Rep. 1027]; *Cowen v. Aldridge*, 14 O. F. D. 21 [114 Fed. Rep. 44; 51 C. C. A. 670]; *Cass Co. v. Railway*, 25 Neb. 348 [41 N. W. Rep. 246; 2 L. R. A. 188]; *Chicago, B. & Q. Ry. v. Richardson Co.* 61 Neb. 519 [85 N. W. Rep. 532].

Parts of streets and lots covered by side tracks or used for the slopes supporting the side tracks or used for handling freight, are all a part of the "roadbed" of the plaintiff, or are "really necessary to the daily running operations of the road," and are taxable only as part of the railway and not as separate items. *Chicago & N. W. Ry. v. Miller*, 72 Ill. 144; *Chicago & Alton Ry. v. People*, 98 Ill. 350; *People v. Board of Equalization*, 205 Ill. 296 [68 N. E. Rep. 943]; *Chicago, M. & St. P. Ry. v. Cass Co.* 8 N. Dak. 18 [76 N. W. Rep. 239]; *St. Louis, I. M. & S. Ry. v. Miller Co.* 67 Ark. 498 [55 S. W. Rep. 926]; *Pfaff v. Railway*, 108 Ind. 144 [9 N. E. Rep. 93]; *Burlington & M. R. Ry. v. Lancaster Co.* 15 Neb. 251 [18 N. W. Rep. 71]; *State v. Railway*, 162 Mo. 391 [63 S. W. Rep. 495].

The action of auditor can not be justified on ground of addition of omitted property, nor as a correction of under-valuation. *Toledo Commercial Co. v. Manufacturing Co.* 55 Ohio St. 217, 220 [45 N. E. Rep. 197].

The following cases were cited and construed in reply brief. *Cleveland, C. C. & I. Ry. v. Marion Co.* (Comrs.) 48 Ohio St. 249 [27 N. E. Rep. 548]; *Cowen v. Aldridge*, 14 O. F. D. 21 [114 Fed. Rep. 44; 51 C. C.

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A. 670]; *Cass Co. v. Railway*, 25 Neb. 348 [41 N. W. Rep. 246; 2 L. R. A. 188]; *Maine v. Railway*, 142 U. S. 217 [12 Sup. Ct. Rep. 121, 163; 35 L. Ed. 994]; *Pittsburg, C. C. & St. L. Ry. v. Backus*, 154 U. S. 421 [14 Sup. Ct. Rep. 1114; 38 L. Ed. 1031]; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 [11 Sup. Ct. Rep. 876; 35 L. Ed. 613]; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 [8 Sup. Ct. Rep. 961; 31 L. Ed. 790]; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1 [16 Sup. Ct. Rep. 1054; 41 L. Ed. 49]; *Adams Express Co. v. State*, 10 O. F. D. 655 [165 U. S. 194; 17 Sup. Ct. Rep. 305; 41 L. Ed. 683]; *Fargo v. Hart*, 193 U. S. 490 [24 Sup. Ct. Rep. 498; 48 L. Ed. 761]; *State v. Hagerty*, 3 Circ. Dec. 161 (5 R. 325).

A. B. Benedict, for defendant.

HOFFHEIMER, J.

This was an action to enjoin the treasurer of Hamilton county from collecting taxes on certain additions made by the auditor to the tax duplicate on property of plaintiff for the years, 1891 to 1899, inclusive. The cause was reserved to the general term for decision.

The plaintiff is the lessee of the Cincinnati Southern railway, a line built and owned by the city of Cincinnati. The road, as is well known, extends from the city of Cincinnati, Ohio, to the city of Chattanooga, Tennessee. Under the lease of said road the lessees pay all the taxes. The agreement includes the years for which the additional taxes herein are sought. During these years, namely: 1891 to 1899, both inclusive, plaintiff made to the auditor of Hamilton county, on printed forms furnished for that purpose by the auditor of state, returns of its taxable property. The statements for the respective years consist of several schedules. According to schedule E (for the years, 1892 to 1899) the company returned:

"Tracks, including roadbed, right of way, etc., owned or held by said company in the state of Ohio as exist on said date."

The return for 1891, although different in form, is to the same effect substantially. Under the schedule the plaintiff stated it had .56 of a mile of main track in Ohio, and it placed a value thereon of \$12,000 per mile, and that it had side tracks to the extent of 10.19 miles (in 1891), increasing gradually, however, throughout said years to 11.18 miles (in 1899), upon which it placed a valuation of \$2,000 per mile. The evidence shows that the auditor, acting as the board of appraisers and assessors for said railway company, fixed the valuation of the main track at \$12,000 per mile, and the side track at \$2,000 per mile for the years in question, and accordingly such valuations were placed upon the duplicate, and taxes were duly paid by plaintiff. The stem or main track of the railroad begins, as shown by the evidence, at Gest street, in the city of Cincinnati, and approaches and crosses over the Ohio river

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by means of a trestle and bridge structure, built by the trustees of the southern railway expressly for that purpose. The trestle structure is about 1,299 feet in length, and the bridge structure on the Ohio side about 1,233 feet in length and both are described as numbers 1 and 10 in the petition. The bridge and trestle occupy the lots numbered in the petition 2 to 9, also 11 to 16 inclusive.

The evidence shows that all these lots are necessary for the maintenance of said bridge and trestle. The "side tracks" in question are built on lots number 5 to 9, also 4 to 35, described in the petition number 1 to 35 inclusive. The parts of said lots not covered by rails are used as "slopes," to support the tracks, and also for the loading and unloading of freight, in the daily operation of the business. The eight parcels of ground described in the petition as lots 1 to 8, all the evidence shows, were acquired by the trustees to establish a connection with the C. H. & D. railroad. The ground lies very low, and a considerable fill will be required to make said lots available for said purpose. At the time in question the fill had not been made, nor was the connection made, nor were said lots used for purposes other than those of the railroad.

In 1899, the auditor claimed that the bridge and trestle, and the several lots thus briefly referred to, were "lands, town lots or improvements, structures or fixtures thereon, subject to taxation within his county;" that they had not been returned by the assessor or had escaped taxation through error of the auditor. He therefore proceeded to ascertain the value of the bridge, trestle and lots as separate items and placed the entire sum on the duplicate, claiming that the true value of said property was \$265,580 more for each year in question than the value returned, assessed and taxed. Upon this valuation he added taxes as far back as the last decennial appraisement, inclusive of 1891, in all in the sum of \$64,567.79 and also penalties. Thereupon plaintiff brought this action to enjoin the collection of said taxes, and a temporary order was allowed by the court below.

In 1900, the auditor, without removing from the duplicate of real estate, the additions thus made by him, put the foregoing described property on the duplicate as personal property also, and added simple taxes for the five years including and preceding the year, 1899, in the sum of \$42,514.03 and also penalties. The plaintiff by supplemental petition thereupon asked that the collection of the additional taxes be enjoined, and again a temporary restraining order was allowed.

Under the issues the question is, Was the auditor's action in thus attempting to tax separately the property involved valid or invalid? The plaintiff claims it was invalid because it is urged, the bridge and trestle and side tracks and lots, more specifically described in the petition was

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“roadbed” and “property necessary to the daily operation of the road,” and was therefore taxable as a unit; that is to say, averaged over the entire road. In accordance with this theory its returns for taxation were made.

On the other hand, defendant contends that the statutes, particularly Rev. Stat. 2774 (Lan. 4116), with reference to the taxation of railroad property, contemplate two distinct classes: (a) a class to which belongs main track, rolling stock, roadbed, supplies, money and credits; (b) the class to which belongs real estate, structures and stationary personal property. And defendant claims that the property of class A is property that may be “spread out,” or apportioned over the entire road for taxation, while that of class B is property that is to be localized for taxation. Defendant contends that the property involved in this action all falls in the latter class, and was therefore to be locally taxed, either as personalty or as real estate, whichever it may be found to be. A determination of the questions presented involves Rev. Stat. 2770 to 2776 (Lan. 4112 to 4118), which are the sections relative to the taxation of railroad property. The Cincinnati Southern railway, which is the property operated by plaintiff, the lessees of the trustees of the city of Cincinnati, is not wholly within the state of Ohio, but is partly within that state—only in the county of Hamilton—and partly without the state. In taxing the property of such a railroad, we are of opinion that Rev. Stat. 2772, 2776 (Lan. 4114, 4118), in particular govern, and not Rev. Stat. 2774 (Lan. 4116). Revised Statutes 2772 (Lan. 4114) is as follows:

“It shall be the duty of each board to meet in the month of May, in the present and each succeeding year, at such time as the president thereof may appoint; and if no meeting be appointed by him before the second Tuesday in May, the several county auditors shall meet on that day, in the place where the proper railroad for which said auditors constitute the board, as aforesaid, has its principal office, or in the principal city or village upon the line of such road, as the case may be, and proceed to ascertain all the personal property which shall be held to include roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys, and credits of such company, and the undivided profits, reserved or contingent fund of said company, whether the same may be in moneys, credits, or in any manner invested, and the actual value thereof in money.”

By this section the board is required to ascertain all the personal property of the railroad. The section, it will be observed, also describes with particularity what the personal property consists of:

“Which shall be held to include roadbed, water and wood stations,

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and such other realty as is necessary to the daily running operations of the road."

Revised Statutes 2776 (Lan. 4118), is as follows:

"When any railroad company has part of its road in this state and part thereof in any other state or states, the proper board shall take the value of such property, moneys, and credits of such company so found and determined, as aforesaid, and divide it in the proportion the length of such road in this state bears to the whole length of such road, and determine the principal sum for the value of such road in this state accordingly, equalizing the relative value thereof in this state, as above provided."

This section, it is evident, has reference to a railroad that has part of its road in this state and part thereof in another state or states. In our opinion the words, "such property" refer back to Rev. Stat. 2772 (Lan. 4114), and "such property" shall be distributed for taxation, in the proportion the length of such road bears to the whole length of such road and determine the principal sum for the value of such road in this state accordingly. The "such property" (personal property under Rev. Stat. 2772; Lan. 4114), here referred to, therefore, includes "roadbed" and "realty necessary to the daily running operations of the road." In other words, "roadbed" and "other realty necessary to the daily running operations of the road" are made personal property for taxation purposes. Such being the construction to be placed on said statutes, the question would be, Is this bridge structure or trestle and the ground on which it rests roadbed and realty necessary to the daily running operations of the road?

The uncontroverted evidence shows it is property necessary to the daily running operations of the road. Indeed counsel for defendant admit such to be the fact. Courts of dernier resort in several of the states and the Supreme Court of the United States have many times held that a bridge or structure built for purposes such as the one in controversy is a necessary part and parcel of the road itself; that it is "roadbed." In the language of Justice Gray it may be said to be "railway viaduct rather than a bridge." "It is a road built over water instead of on land." *Pitts. C. & St. L. Ry. v. Bridge Co.* 131 U. S. 371 [9 Sup. Ct. Rep. 770; 33 L. Ed. 157]. See also *State v. Railway*, 97 Mo. 348 [10 S. W. Rep. 436]; *People v. Railway*, 215 Ill. 177 [74 N. E. Rep. 116]; *Schmidt v. Railway*, 24 S. W. Rep. 547 [Tex. Civ. App.]; *St. Louis & S. F. Ry. v. Williams*, 53 Ark. 58 [13 S. W. Rep. 796]; *State v. Mutchler*, 41 N. J. Law 96; *People v. Railway*, 206 Ill. 252 [68 N. E. Rep. 1059]; *Anderson v. Railway*, 117 Ill. 26 [7 N. E. Rep. 129]; *Chicago, St. L. & N. O. Ry. v. Commonwealth*, 115 Ky. 278 [72 S. W. Rep. 1119]; *Union Pacific Ry. v. Hall*, 91 U. S. 343 [23 L. Ed. 428].

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These authorities would seem to be decisive, but defendant in combating the contention of plaintiff relies on *Cowen v. Aldridge*, 14 O. F. D. 21 [114 Fed. Rep. 44; 51 C. C. A. 670], and insists that said case is decisive of the claim here made by the treasurer, namely: that Rev. Stat. 2774 (Lan. 4116) governs the taxation of this bridge structure and the remainder of the property here involved, and that the property in controversy falls within class B, *supra*. Even if we were to hold that Rev. Stat. 2774 (Lan. 4116) was applicable and controlling we fail to see, in view of the construction placed upon that section by our Supreme Court, how such position could avail defendant. In *Clev. C. C. & I. Ry. v. Marion Co. (Comrs.)* 48 Ohio St. 251 [27 N. E. Rep. 548], speaking in regard to Rev. Stat. 2774 (Lan. 4116), Bradbury, J., said:

"This section provides that such proportion of the entire property of the railroad, except realty not necessary to its daily running operations, shall be taxed in each district through which it runs, as the length of road in such district bears to its whole length."

The class, therefore, into which defendant insists the property in controversy belongs (property to be localized) is realty not necessary to the daily running operations of the railroad. Obviously the property in controversy cannot belong to that class because as we have seen it is admittedly property necessary to the daily running operations of the railroad. For this reason *Cowen v. Aldridge, supra*, is not in point.

In the next place the facts in *Cowen v. Aldridge* were so essentially different from those in the case at bar that a close reading of that case will reveal why the court held the "bridge" taxable as a bridge. It was not roadbed and property to be localized. In the Bellaire case, *Cowen v. Aldridge, supra*, the bridge was not as a matter of fact a necessary part of the railroad proper. It was built to connect two railroads, the Central Ohio Railroad Company, which had its railroad on the Ohio side of the river, and the Baltimore & Ohio Railroad Company whose railroad is built to the east side of the Ohio river; that is to say, on the side opposite. The bridge connects two populous towns, and the evidence shows that heavy additional charges were made to passengers and shippers of freight. The bridge may be said to have had a business, and a financial as well as legal character clearly distinguishable from "main track" laid upon it. It had, aside from its use for main track, other distinguishing and valuable uses.

The bridge in the case at bar was built by the trustees of the Southern railway as part and parcel of said railway, and in order to permit its trains to go from the terminal in Ohio to the terminal in Chattanooga. The trustees had no power to build a bridge for any other purpose than that of a railroad. They certainly had no power to build a bridge for use as a bridge independently of the necessary roadbed. (On this

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point see *Union Pacific Ry. v. Hall*, 91 U. S. 343-350-351 [23 L. Ed. 428].) And furthermore the testimony shows the bridge was adapted for, and to be used for, the purposes of a railroad solely. True it appears that the lessees have built a foot path at the expense of the citizens of Ludlow, and it seems a nominal sum is collected for the purpose of keeping said foot path in repair, but in our judgment the power given the trustees to build this bridge, the purpose for which it was built, and its use under the law indicate the true character of this bridge for the purpose of determining the legal question as to the manner in which the same shall be taxed, and the mere incident of the building of this foot path by the lessee cannot alter the true character of the structure for taxation purposes.

It is also clear, that, as far as this railroad is concerned, no additional charges are exacted of shippers or passengers, and the mileage on this bridge is treated by the railroad precisely as is every other mile of road. (See the testimony of Mr. Nicholson.) That the character of the bridge in *Cowen v. Aldridge*, *supra*, was a vital consideration is evident by what the court says at page 29:

"Additional rates are charged to passengers and freight using the bridge. It has a distinct value as a bridge, irrespective of its present use for railroad purposes."

And again at page 30 the court says:

"It may be the practice to assess bridges as part of such main track of railroad in Ohio. It may be, that many bridges have no value except to carry the track of the company. Whether this practice, if it exists, be right or wrong, is immaterial here, in view of the character and ownership of the bridge in question."

It will be observed that not one of the authorities cited above, holding that a bridge is roadbed or part of the road was referred to by the circuit court of appeals. The failure to notice these authorities can only be satisfactorily explained upon the theory that the facts in that case, as already indicated, stamp the Bellaire bridge with a character of its own—a thing separate and apart from the railroad. In short, it was a bridge pure and simple.

Finally, the decision in *Cowen v. Aldridge*, *supra*, is based solely on *Cass Co. v. Railway*, 25 Neb. 348 [41 N. W. Rep. 246; 2 L. R. A. 188]. The court, in *Cowen v. Aldridge*, *supra*, page 29, said (referring to the bridge in question):

"It is, in our judgment, a structure, within the meaning of the statute, and to be taxed as other local structures are in the district where it is situated. Similar considerations led the supreme court of Nebraska to like conclusions in a well-considered case."

But the very case, upon which *Cowen v. Aldridge*, *supra*, was

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based, was itself subsequently overruled in *Chicago, B. & Q. Ry. v. Richardson*, 61 Neb. 519 [85 N. W. Rep. 532].

In view of these considerations, therefore, and under the circumstances of the case at bar, whatever view may be taken of *Cowen v. Aldridge*, *supra*, it would be manifestly unsafe to apply that decision. On the other hand, in view of the authorities herein cited, and especially mindful of the language of our Supreme Court in *Clev. C. C. & I. Ry. v. Marion Co. (Comrs.)*, *supra*, it seems to us a proper interpretation of the statutes involved would require that the term "roadbed" as used in the statute must be held to include a bridge, when that bridge, as in the case at bar, was built for, and is used solely for, the purpose of supporting the railroad tracks and is part and parcel of the road and is necessary to its daily running operations.

Nor can we agree with defendant that this interpretation renders Rev. Stat. 2776 (Lan. 4118) unconstitutional. This section has reference only, it will be noticed, to railroad property partly within and partly without the state. Our constitution aims to tax all property. The property of a railroad is not exempted by this section. A railroad could not fairly be valued other than as a unit—as a continuous line. This is necessarily so, and our state policy recognizes the fact. The section refers only, as we have endeavored to show, to the property described in Rev. Stat. 2772 (Lan. 4114). Merely because the section is silent as to the property of an interstate railroad which may have a fixed *situs*, and which may be found to be not "necessary to the daily running operation of the road" is no reason why said statute can be said to create an exemption as to such property. The taxing statutes would reach such property. One thing appears certain:

Revised Statutes 2776 (Lan. 4118) does provide a method, a uniform mode of taxing the kind of property mentioned; that is to say, property necessary to its daily running operation partly within and partly without the state, and such a system for taxing interstate railroads or companies has met the approval of the Supreme Court of the United States. *Maine v. Railway*, 142 U. S. 217 [12 Sup. Ct. Rep. 121, 163; 35 L. Ed. 994]; *Pitts. C. C. & St. L. Ry. v. Backus*, 154 U. S. 421, 430 [14 Sup. Ct. Rep. 1114; 38 L. Ed. 1031]; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 [11 Sup. Ct. Rep. 876; 35 L. Ed. 613].

In *Pitts. C. C. & St. L. Ry. v. Backus*, *supra*, the Supreme Court said, page 430:

"Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

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Are the lots and portion of the streets upon which side tracks are laid, separately taxable as the treasurer claims, or are they also to be considered "roadbed" and "realty necessary to the daily running operations of the road," and as such apportioned by mileage? Under the evidence we find that the side tracks and the lots on which they are laid are necessary to the daily running operations of the road, and we are of opinion that they too must be considered as roadbed, and not to be taxed as separate items. In *Chicago & Alton Ry. v. People*, 98 Ill. 350, the court said:

"We can see no reason why the term right of way should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch or a turnout is built and in actual use by the company in the business for which it was organized for all practical purposes is as much held for right-of-way as is the land upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other, and hence the necessity of turnouts, switches and side tracks. In the loading of cars, transfer of cars, the making up of trains and innumerable other instances that might be named in the prosecution of its business as a common carrier side track, switch or turnout passes can be termed a proper transaction of its business as the main track itself.

We are therefore of opinion that the land held and in actual use by the railroad company for side tracks, switches and turnouts must be regarded within the meaning of the revenue law as a part of the right of way of the company. It is used in the transportation of freight and also for the purpose of carrying passengers alike, with the land upon which the main track is constructed, and upon which principle the land upon which the main track is laid can be held to be right-of-way and the land over which a side track, switch or turnout passes can be termed something else, we are at a loss to understand." See also *Chicago & N. W. Ry. v. Miller*, 72 Ill. 144; *People v. Board of Equalization*, 205 Ill. 296 [68 N. E. Rep. 943]; *Chicago, M. & St. P. Ry. Co. v. Cass Co.* 8 N. Dak. 18 [76 N. W. Rep. 239]; *St. Louis, I. M. & So. Ry. v. Miller Co.* 67 Ark. 498 [55 S. W. Rep. 926]; *Pfaff v. Railway*, 108 Ind. 144 [9 N. E. Rep. 93]; *Burlington & M. R. Ry. v. Lancaster Co.* 15 Neb. 251 [18 N. W. Rep. 71]; *State v. Railway*, 162 Mo. 391 [63 S. W. Rep. 495]. These authorities we think are decisive.

We likewise think that the parcels of ground, numbers 1 to 8, purchased for the purpose of making connections with the C. H. & D. Ry. Co. was also properly returned for taxation by the railroad company and is not separately taxable. We find from the evidence that the lots were purchased for the purpose mentioned and were to be used for such purpose and no other when filled; that such property devoted to such purpose is a part of the road as a whole and was properly returned by the plaintiff

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company for taxes apportioned on the mileage basis it seems to us was decided in *Burlington & M. R. Ry. v. Lancaster Co.* 15 Neb. 251 [18 N. W. Rep. 71], and also in *State v. Railway, supra*. In the latter case it was held:

“Taxation: Switch yards and other real property necessarily appurtenant to the railroad’s efficient equipment as a means of traffic are not subject to taxation by the local authorities but are to be included in that class of property which the statute requires to be assessed by the state board of equalization, and although the railroad may have owned the lots for some years and as one yard and part of them for stock yard purposes, yet, if it is used for no other purpose and does not appear to have acquired more land than was reasonably necessary for switch yard purposes in view of the prospective growth of the city and the business, the property is to be assessed by the state board.”

Finally, the property involved in this controversy was returned for taxation and the taxes found due thereon duly paid by plaintiff after the auditor, under and by virtue of Rev. Stat. 2772 (Lan. 4114), had ascertained its value. The evidence shows that the auditor undertook to tax it again on the theory that it was omitted property. All the steps taken by him show that in the opinion of that officer it was property that had escaped taxation. But as we have already pointed out, it did not escape taxation and could not be said to be omitted property. The only question remaining then would be, Was the auditor justified in again placing this property on the duplicate on the ground that his action was in effect a revaluation or correction of an undervaluation?

If the auditor has any such powers in respect to property of this character—property which according to law he had appraised and assessed in the first instance, and no doubt correctly, that power is to be found in Rev. Stat. 2781a (Lan. 4159).

The exception engrafted upon the statute, it will be noticed, speaks only of omitted property; that is, property that has escaped taxation. Certainly it was not intended that there should be a reassessment or a reappraisement of that which the officer had already appraised. Otherwise, as is pertinently asked by counsel for plaintiff, How many times is it necessary to assess railroad property? In our judgment this section gives the board jurisdiction to appraise and assess omitted property and denies jurisdiction to reassess and reappraise that which has already been assessed according to law.

Moreover, and it seems to us a conclusive answer to the assessment in this case is found in this fact, that the auditor according to the evidence (page 183, bill of evidence) stated that in undertaking to make the revaluation considered nothing outside of the county of Hamilton. The auditor’s action, therefore, even if he has power to reassess was not such a reassessment as would be proper, because Rev. Stat. 2776 (Lan.

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4118), as we have seen would make it imperative that property of an interstate railroad be apportioned by mileage. This was not done.

In conclusion we find under the law, and the evidence that the auditor in seeking to place this property on the duplicate as real estate under Rev. Stat. 2803 (Lan. 4189), acted without authority. Revised Statutes 2772 (Lan. 4114) governed. When subsequently by virtue of Rev. Stat. 2781a (Lan. 4159), he again sought to place this property on the duplicate as personalty as omitted property or as revalued or reassessed property he again acted without legal justification. As stated, the railroad company made its returns according to law and it paid the taxes contemplated by law on the property involved. It was therefore entitled to the injunctions originally allowed, and we order the same to be made perpetual.

Ferris, J., concurs.

HOSEA, J., concurring.

I am in accord, in the main, with the views of my respected colleague, expressed in the foregoing opinion and with the results stated. It is perfectly clear to my apprehension that the bridge in question, with its approaches, is part of the roadbed,—a “railway viaduct,”—constituting part of the main thoroughfare and necessarily used in the “daily operations” of the road. That the value thereof is to be carried into the total and distributed to the counties for taxation, as provided by law, necessarily follows.

It is not so clear to my mind that a terminal yard and other structures for the storage of property and other uses, however convenient, and necessary, for use in the general operation of the railway, are included in the intent of our tax statutes. This language, when contrasted with the corresponding phrases in the taxation statutes of other states, under which the cited decisions were rendered, seems, at first blush, to have a limiting purpose that is not without strong reasons in its support. The phrase “daily running operations” of a railway, would seem to have direct reference to the actual running of trains and nothing more. The language chosen is at least strongly suggestive; and this view, it may be said, is more directly in accord with the reasons underlying the principle of distributive taxation of such property as is of a transitory or nonlocalized character. Indeed, the reasoning in *People v. Board of Equalization*, 205 Ill. 296 [68 N. E. Rep. 943], seems to lay stress upon this characteristic even under statutory language of a broader scope. The same reasoning appeared in *Chicago & Alton Ry. v. People*, 98 Ill. 350, where thirty-two acres of railroad “yards” at Burlington were held to belong to the distributable class under the statutory phrase “right-of-way.” The court cites the necessity of side tracks and turnouts used to enable trains to pass each other and pro-

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ceeds to class "yards" as within the intent of the law, by parity of reasoning, because necessary to the use and operation of the railway.

In the later case the yards at Chicago were held to be within the same principle of classification. But in these and other cases cited, the decisions rest upon statutes of broader definitions than our own,—such as "track," "main track," and "right-of-way" used in the general operations of a railway. In contrast with these phrases the limitation to property required in the "daily running operations" of a railroad seems to suggest a narrower definition, and it may be said that yards used primarily for the storage of cars when not in use fall without the limitation.

Much may be said on both sides of the question; but as the question, in its broader aspect as relating to the policy of taxation, is practically covered by the reasoning of courts of last resort in other states, and by the Supreme Court of the United States, upon the general principle involved, I am disposed, to the extent involved in the present controversy, to give my concurrence to the ruling of the majority, but with these suggestions.

NOTICE—PRINCIPAL AND SURETY.

[Superior Court of Cincinnati, General Term, March, 1906.]

Ferris, Hosea and Littleford, JJ.

(Judge Littleford of Hamilton common pleas, sitting in place of Judge Hoffheimer.)

JOHN H. VOSS V. ROSE F. MOORMAN ET AL.

NOTICE TO SUE GIVEN BY SURETY TO CREDITOR'S HUSBAND SUFFICIENT IF READ BY CREDITOR, AND HUSBAND AS ATTORNEY GIVES ADVICE THEREON.

Notice sent by a surety on a note, to the husband of the owner of the note, if shown after its receipt to the owner, and discussed for some time by the owner and her husband, the latter as the agent and attorney of the owner, advising her to disregard it, is sufficient to discharge the surety from liability on the note under Rev. Stat. 5833 (Lan. 9372).

[For other cases in point, see 7 Cyc. Dig., "Principal and Surety," §§ 265-276.—Ed.]

ERROR to special term.

D. F. Cash, for plaintiff in error.

Stephens. Lincoln & Stephens, for defendants in error.

FERRIS, J.

The action below sought to recover on a promissory note, signed by Robert A. Moorman and John H. Voss, payable six months after date, to the order of William D. Grote, by whom it was indorsed in blank. No

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question was made as to the execution of the note, but defendant, Voss, filed answers making it imperative on the plaintiff to establish the ownership of the note, and denying many of the allegations of the petition with respect to matters not, in our opinion, necessary to comment upon at this time. On November 17, 1900, defendant, Voss, claiming to be surety on the note, in pursuance of Rev. Stat. 5833 (Lan. 9372), sent notice to Frank J. Moorman, requiring him to commence action on the note against Robert A. Moorman, codefendant, and alleged to be the principal debtor.

Suit was brought on the note on May 23, 1901, by Rose F. Moorman, claiming to be the holder of the note. Defendant, Voss, claimed full discharge from all liability, by reason of the delay in instituting the suit, under the provisions of Rev. Stat. 5833 (Lan. 9372), that,

"A person bound as surety in a written instrument for payment of money, or other valuable thing, may, if a right of action accrue thereon, require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor; and unless the creditor commences such action within a reasonable time thereafter and proceed with due diligence, in the ordinary course of law, to recover judgment against the principal debtor for the money or other valuable thing due thereby, * * * failing to comply with the requisition of such surety, shall thereby forfeit the right which he would otherwise have, to demand and receive of such surety the amount due thereon."

Notice, given as required by this section, complied in words and effect with the provisions of the statute, but the court below found, that inasmuch as the provisions were contrary to the common law, the section should be strictly construed, and that the notice given, as shown by the testimony, was defective, in that it was addressed to Frank J. Moorman, husband of the holder of the note, and not to the creditor herself, relying on *Gaston v. Barney*, 11 Ohio St. 506, and *Clark v. Osborn*, 41 Ohio St. 28, where the court say, page 36:

"The statute, in a sense, is a part of the contract. The suretyship is accepted with knowledge of its terms. It gives rights to both parties. The right of the creditor is to disregard with impunity any notice not in strict conformity to its terms."

This doctrine was also relied upon in *Baker v. Kellogg*, 29 Ohio St. 663, 665, where the court held that this statute, "provides for the release of a party from a fixed legal liability—from the payment of a debt which he justly owes—requirements should be at least substantially, if not strictly and literally complied with."

Thus it will be seen that the doctrine in this state requires that the testimony should show compliance with the provisions of this statute as to the conditions of the release of the surety, and that this compliance

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shall not fall short of "strict conformity" to the provision of this section.

The court charged, page 210 of the record:

"There is no evidence that notice as required by law was given her (Rose F. Moorman) as principal creditor, and that if the jury should find that Voss was a surety, from the testimony, he would, under the circumstances, still be liable."

We believe that the testimony was fairly submitted to the jury, as to the ownership of the note, and there would hardly be a contention made that the jury was not also fully advised by competent testimony as to the position that Voss held on the note. It becomes necessary then to examine the testimony to disclose what was done in the matter of notice. Was the notice sufficient under the provisions of Rev. Stat. 5833 (Lan. 9372) ?

It may be assumed that the testimony established the fact that, in all matters relating to the note, Frank Moorman acted as agent and attorney for his wife, the creditor who claimed to be the legal holder of the note. The testimony is full and conclusive upon this question. At times he had the note in his possession, received credits that were intended to be applied upon the note, and seemed to be the holder of the note. Therefore, it was, that notice under the section was sent to him as creditor and owner of the note, and not to Mrs. Rose F. Moorman, the plaintiff below.

Under the issues made by the pleadings, the burden was upon the defendant below, Voss, to establish the sufficiency of the notice as bearing upon the question of payment and consequent release by him of all obligation. It was not claimed that Voss or Moorman had actually paid the balance appearing by the note, but Voss was claiming discharge by reason of the provisions of the statute.

It is not necessary, in our opinion, to consider the question of agency under the facts shown and we do not disagree with the conclusions of the trial judge that, "Notice to the agent would not be notice to the principal," in some cases. We think the undisputed facts show notice to the principal.

On page 28 the plaintiff below, Rose F. Moorman, says with reference to the notice mailed to her husband that he showed it to her, and in answer to the question, "Did you read it?" she said:

"Mr. Moorman read it to me and then I took it and looked at it and read it."

On page 150 of the record, in answer to the question by his own counsel, Frank Moorman stated, with reference to the notice, that he

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had advised Rose F. Moorman to disregard the notice. This he did as her attorney, saying that he did so:

"As soon as I read the letter to her, or notice to her, I talked to her for an hour and a half on the subject."

On page 150 of the record, counsel for Voss submitted to witness, Moorman, the question:

"How soon after the receipt of that paper (marked exhibit "H" in the record, and being the notice), if at all, did you give it to your wife?"

Objection being made, the court sustained the position of counsel objecting, and the exception was noted. Defendant, Voss, stated that he expected to show by the witness that almost immediately upon receipt of the paper it was handed by him to his wife, and read to her, and its contents discussed between them, and immediately after, on page 151, in answer to the question, "Why did you tell her to disregard this notice?" witness stated:

"Because it had nothing to do with her at all. I explained the law to her."

Again counsel attempted to offer the paper in evidence and was again refused by the court, and the exception was noted, by which it is apparent that counsel for defendant, Voss, was denied the opportunity to show what in law is regarded as payment or satisfaction of the obligation of the defendant, Voss.

What is the meaning of the expression, "strict compliance," or "strict conformity"? *Baker v. Kellogg, supra*, on page 663, answers the question as to the rule applicable bearing upon the contents of the notice; that is, the sufficiency of the notice; but *Meridian Silver Plate Co. v. Flory*, 44 Ohio St. 430 [7 N. E. Rep. 753], reviewing *Baker v. Kellogg* and *Clark v. Osborn, supra*, found as to the legal sufficiency, and held, that technical accuracy as to the contents was not required, and found the notice good, that had been sent through the mail and taken from the post office "by some one for said plaintiff corporation."

The question therefore was, did the creditor receive the notice? There was no question but what the agent received it, but this was not sufficient.

Did Rose F. Moorman receive this notice? We have referred to the testimony of both herself and her husband, admitting the receipt of the letter and showing a full discussion as to the contents, and this within a short time after its receipt, and therefore we are of the opinion that there was a compliance on the part of Voss with the provisions of the statute as to the notice; that whether Frank Moorman was agent or attorney, and whatever may have been his position with reference to the note,—and assume for the purpose of the discussion that Rose Moorman was, as the jury found, the owner of the note,—the facts indicate

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that the notice sent was received by her, and acting under the advice of her lawyer she paid no attention to it.

We are of the opinion, therefore, that there was prejudicial error in the court's instruction to the jury that the notice as served was insufficient. The facts as to notice being shown by undisputed testimony, necessitate not only the reversal of the judgment below, but make it imperative that we render a judgment for the plaintiff in error, which is accordingly done. *Cleveland City Ry. v. Bank*, 68 Ohio St. 582, 596 [67 N. E. Rep. 1075].

Hosea and Littleford, JJ., concur.

FRAUDULENT CONVEYANCES.

[Summit Common Pleas, October 5, 1906.]

LYDIA G. HAMILTON v. MINNIE RUDY.

DEED FROM A HUSBAND, TAKEN WITH KNOWLEDGE THAT A DIVORCE SUIT HAD BEEN FILED AGAINST HIM AND THAT HUSBAND HAD NO OTHER PROPERTY, VOID FOR FRAUD—SUBSEQUENT PURCHASER NOT FOR VALUE AND KNOWING UNCERTAINTY OF GRANTORS' TITLE NOT PROTECTED.

A conveyance by a husband, of his one-half interest in a lot owned jointly with his wife, made to a woman with whom he was then living and whom he afterwards married, at a time when the wife had already filed her petition for divorce and alimony, the husband and his grantee both knowing this fact and the grantee knowing also that the husband had no other property, and that the wife was in possession of this, is fraudulent and void as to the wife and as against a subsequent decree for alimony awarding this one-half interest to the wife. A subsequent purchaser from this grantee and her husband, knowing at the time of purchase that the grantors were uncertain as to character of their interest, owing to the divorce and alimony decree, and taking the property without examination and giving no valuable consideration therefor, has no interest in the property and the title of the wife will be quieted as against her and her grantee.

[For other cases in point, see 3 Cyc. Dig., "Divorce and Alimony," §§ 214-220.—Ed.]

[Syllabus approved by the court.]

Tibbals & Frank, for plaintiff:

Cited and commented on the following authorities. *Tolerton v. Williard*, 30 Ohio St. 579; *John v. John*, 5 Circ. Dec. 535 (12 R. 328); *Fletcher v. Fletcher*, 8 Circ. Dec. 271 (15 R. 271); *Gishwiler v. Dodez*, 4 Ohio St. 623; *Bazell v. Belcher*, 31 Ohio St. 572; *Collier v. Bickley*, 33 Ohio St. 523; *Bowen v. Bowen*, 36 Ohio St. 312.

Kohler, Kohler & Mottinger, for defendant:

Cited and commented on the following authorities. *Hamlin v. Bevans*, 7 Ohio (pt. 1) 161; *Fox v. Reeder*, 28 Ohio St. 181 [22 Am. Rep. 370]; *Tolerton v. Williard*, 30 Ohio St. 579; *John v. John*, 5 Circ. Dec. 535 (12 R. 328); *Union Sav. Bank & Tr. Co. v. Building Co.* 14 Dec. 401.

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WASHBURN, J.

There are certain facts in this case that are not disputed, which are as follows:

For a long time previous to September, 1901, Andrew Rudy and Minnie Rudy were husband and wife, and resided with their children on premises in Barberton, Summit county, Ohio, which they owned in common, each owning one-half thereof. Andrew Rudy owned no other property.

In September, 1901, Andrew Rudy deserted his wife and family and went to Dayton, Montgomery county, Ohio, and began boarding with Adalena Miller, whom he afterwards married.

On September 18, 1902, Minnie Rudy sued Andrew Rudy for divorce and alimony in Summit county, and although two attempts to get service upon Andrew Rudy, by issuing process to the sheriff of Montgomery county, were made, no service was obtained until March of 1904.

In the meantime Andrew Rudy had brought suit for divorce in Montgomery county, and later dismissed his suit.

On February 1, 1904, Minnie Rudy filed an amended petition for divorce in which she described her husband's half interest in said premises, and asked that the same be given to her as alimony.

Summons on the amended petition was issued to the sheriff of Montgomery county on February 1, 1904, and returned "not found."

On February 24, 1904, Andrew Rudy deeded his said one-half interest in said premises to Adalena Miller, the consideration therefor, as testified to by Andrew Rudy and Adalena Miller, being \$200 cash and an account of about \$100 which Adalena Miller held against Andrew Rudy, and said deed was recorded in Summit county on February 26, 1904.

The whole property was worth \$2,500 at the time of said sale of a half interest of it.

On February 29, 1904, another summons was issued on the amended petition, and the same was regularly and properly served on Andrew Rudy on March 2, 1904.

On May 21, 1904, Minnie Rudy was granted a divorce from Andrew Rudy and was also granted his one-half of said premises as alimony, and he was ordered to convey same to her within five days, and on his failure so to convey it was ordered that said decree should operate as a conveyance.

Then said decree contained the following provision:

"It is further ordered, adjudged and decreed that in the event said defendant has conveyed his interest in said real estate above described, so as to defeat the order, decree or judgment, awarding the interest of said defendant in said premises to the plaintiff as her alimony, the

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plaintiff is hereby allowed and decreed as reasonable alimony the sum of \$1,000 which is to be paid in monthly installments of \$25 on the first Saturday of each and every month until said sum is paid, or until the further order of the court."

During all this time and up to the present time Minnie Rudy with her children has occupied the whole of said premises and has improved the same and exercised ownership over the same.

On September 10, 1904, Andrew Rudy married Adalena Miller.

On September 2, 1905, Andrew Rudy and Adalena Miller Rudy conveyed said half of said premises to the plaintiff in this suit, Lydia G. Hamilton.

As I have said, the foregoing facts are not disputed.

October 19, 1905, this suit was begun by plaintiff to partition said premises.

The defendant, Minnie Rudy, answered, claiming said premises under her decree, charging that these transfers were made with full knowledge and without consideration, for the purpose of cheating and defrauding her, and asking that the deeds be declared void and her title quieted. Plaintiff replied denying charges of fraud.

As to the disputed facts, I find that at the time of the conveyance by Andrew Rudy to Adalena Miller they both knew that Minnie Rudy had brought suit for divorce against Andrew Rudy in Summit county, although no summons had been actually served on Andrew Rudy; and further that Adalena Miller knew that Andrew Rudy had no other property, and that his wife was in the possession and actual occupancy of said premises.

At the time of the conveyance by Andrew Rudy and Adalena Miller Rudy to plaintiff, said decree of divorce giving said property to the defendant, Minnie Rudy, was a matter of public record in Summit county, where the land was situated, and I find that plaintiff was informed that said Andrew Rudy had been divorced from defendant; that defendant was living in and occupying said premises, and that said Andrew Rudy and his then wife did not know what interest they had in said property; that plaintiff made no investigation as to said property; but traded property therefor which was of no value, and which said Andrew Rudy and Adalena Rudy had not seen and knew nothing about.

Being convinced that the evidence establishes all of the foregoing facts, what decree should a court of equity make?

While technically speaking the wife's right upon divorce being granted, to have alimony out of the husband's estate may not make her a creditor, still in one sense she is a creditor.

In *Lockwood v. Krum*, 34 Ohio St. 1, 9, Judge Boynton, in delivering the opinion of the court, said:

"The claim for alimony * * * rests on the common law

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obligation of the husband to support the wife in a manner suitable to his condition and station in life during the existence of the marriage relation; * * *. And this obligation is as binding after the commission, by the husband, of a marital offense entitling the wife to a divorce, as before. In respect to such obligation she may well be held to be a creditor of the husband."

This language is quoted with approval in *Conrad v. Everich*, 50 Ohio St. 476, 481 [35 N. E. Rep. 58; 40 Am. St. Rep. 679]. Indeed there are a number of cases in Ohio in which the wife's claim to alimony is especially favored in a court of equity. *Chittenden v. Chittenden*, 12 Circ. Dec. 526 (22 R. 498); *Tate v. Tate*, 10 Circ. Dec. 321 (19 R. 532); *Benner v. Benner*, 63 Ohio St. 220 [58 N. E. Rep. 569]; *Questel v. Questel*, Wright 492.

From the evidence in this case it appears to the court that Andrew Rudy and Adalena Miller knew that the defendant had sued Andrew Rudy for divorce, and knew he had no other property, and knowing that the chances were very favorable for the defendant's securing Andrew Rudy's half of this property as alimony in said suit, for the purpose of defeating the defendant in her effort to obtain said property as alimony, executed and delivered the deed in question from Andrew Rudy to Adalena Miller, and all things being considered, the circumstances warrant the court in saying that that was a fraudulent conveyance, and as against the defendant is void.

There can be no doubt that Andrew Rudy intended to prevent defendant's securing alimony, and considering the price paid by Adalena Miller and her knowledge that defendant was the wife of Andrew Rudy and was in the possession of said property, and had sued him for divorce, Adalena Miller cannot be considered an innocent purchaser; indeed, under the circumstances, it is reasonable to conclude that she sympathized with Andrew Rudy, and was willing to assist him in his efforts to prevent defendant's securing said property as alimony.

But it is said by counsel for plaintiff that the defendant cannot prevail, because the divorce suit was not *lis pendens* at the time Andrew Rudy conveyed to Adalena Miller, and the case not being *lis pendens* no valid decree could have been made, transferring the property to the defendant, without making Adalena Miller a party to the suit, which was not done.

It is true that under our statute, Rev. Stat. 5052 (Lan. 8567), which is declaratory of the common law, an action is not "pending so as to charge third persons with notice of its pendency" until "summons has been served or publication made;" that is, the mere filing of the petition and service of summons will "charge" innocent third parties with notice, although they have no actual notice; still, where the third parties have actual notice of the filing of the petition, and in-

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stead of being innocent third parties are attempting to perpetrate a fraud upon the party filing the petition, then that suit as to them is "pending," so as to prevent said third parties from retaining the fruits of their fraud as against the party filing the petition.

While this is not technical "*lis pendens*" because the court at the time of the transfer had not acquired jurisdiction over the person of the defendant or of the subject-matter of the suit, yet, when a transfer of the property made after the petition was filed has been set aside by a court of equity because of fraud, the divorce case should be held to have been so "pending" as to render the decree of the court in the divorce case, transferring the property, operative as against the defendant who is later regularly served, and those who participated with him in the fraud, and subsequent purchasers who acquire title with at least constructive notice and not for value.

The plaintiff in this case who purchased the property after the marriage of Andrew Rudy and Adalena Miller is in no better position than Adalena Miller—indeed it seems that she is in a worse position in a court of equity—because at the time she purchased and for a year previous to that time there was a judgment of the court of common pleas in the county where this land was situated, conveying this property to the defendant as alimony, and the defendant was still in the possession of all of the property and was exercising ownership over the same, and in addition thereto Andrew Rudy and his then wife at the time they sold to the plaintiff, told the plaintiff that they did not know what interest they owned in the property; that there had been a suit for divorce and the extent of their interest was unknown to them, and besides, the plaintiff in fact paid no consideration for said premises.

The facts as known by the plaintiff when she purchased together with the records of Summit county of which she had constructive notice, were suggestive of the fraudulent character of the transfer to Adalena Miller, and rendered competent the testimony showing that plaintiff really paid nothing for the property.

Without further discussing the matter it seems to me that the equity of this case is upon the side of the defendant, and a decree may be taken dismissing the plaintiff's petition, and granting the prayer of the defendant's cross petition, setting aside the conveyance from Andrew Rudy to Adalena Miller and from Andrew Rudy and Adalena Miller Rudy to the plaintiff, and quieting the title of the defendant to the whole of said premises.

Notice of appeal may be entered for the plaintiff and bond therefor fixed at \$150.

There are cases where conveyances are set aside on the ground of fraud in which the grantee is protected to the extent of the money

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actually paid; but this is not a case which calls upon the court to protect the plaintiff to the extent of Adalena Miller's actual payment to Andrew Rudy, for the reason that the plaintiff did not pay that money, and the plaintiff took the property with full knowledge, in law, and paid nothing therefor, and it would not be equitable to require the defendant to pay the plaintiff the money Adalena Miller paid to Andrew Rudy.

DEEDS—WORDS AND PHRASES.

[Hamilton Common Pleas, March, 1906.]

GEORGE B. VAUGHAN ET AL., Tr. v. CATHARINE ZITSCHER ET AL.

OMISSION OF WORD "HEIRS" OR TO NAME SUCCESSORS NOT FATAL TO TRUST DEED GIVING TRUSTEES EXPRESS POWER TO SELL.

The use of the word "heirs," or other words of perpetuity is not necessary to convey a fee simple estate to the trustees in a trust deed showing on its face that the purpose is to give the trustees power to sell. Such trustees pass a fee simple estate in lands conveyed by them. The omission to name successors to the trustees is not fatal as to lands conveyed by the trustees named, and even as to lands unconveyed at their death a trustee might be appointed by the proper court to carry out the purposes of the original trust.

[For other cases in point, see 3 Cyc. Dig., "Deeds," §§ 819-835, 832; 7 Cyc. Dig., "Trusts and Trustees," §§ 221, 265, 266.—Ed.]

[Syllabus approved by the court.]

G. C. Wilson, for plaintiffs.

Cited and commented upon the following citations. 1 Jones, Real Prop. Sec. 593; 1 Perry, Trust (5 ed.) Sec. 315, page 315; Lewis, Trusts (Am. notes by Flint) 108; 27 Am. & Eng. Enc. Law (1 ed.) 107; 1 Washburn, Real Prop. 75, Sec. 149; *Sears v. Russell*, 74 Mass. (8 Gray) 86; *Angell v. Rosenbury*, 12 Mich. 241; 4 Kent's Commentaries 304; *Farquharson v. Eichelberger*, 15 Md. 63; *Spessard v. Rohrer*, 9 Gill (Md.) 261; *Cleveland v. Hallett*, 60 Mass. (6 Cush.) 403; *Ewing v. Shannahan*, 113 Mo. 188 [20 S. W. Rep. 1065]; 2 Pomeroy, Eq. Jurisp. (2 ed.) Sec. 1011; *Brown v. Bank*, 44 Ohio St. 269 [6 N. E. Rep. 648]; *Sowers v. Cyrenius*, 39 Ohio St. 29 [48 Am. Rep. 418]; *Stephenson v. Sedam*, 5 Circ. Dec. 609 (12 R. 408); *Collier v. Grimesey*, 36 Ohio St. 17; *Kline v. Marsh*, 5 Circ. Dec. 352 (12 R. 645); *Richey v. Johnson*, 30 Ohio St. 288; *Miles v. Fisher*, 10 Ohio 1; *Williams v. Presbyterian Soc.* 1 Ohio St. 478; *Gibson v. Lord Monfort*, 1 Ves. 485.

L. J. Dolle, for defendants

S. W. SMITH, Jr., J.

The plaintiffs filed their petition to foreclose a purchase money mortgage on lots 9 and 10 on a plat of subdivision of part of lots 1, 2,

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3 and 4 of George Vaughan's estate, the same being situated on Vaughan road, Price Hill, in the city of Cincinnati.

The defendants' answer sets forth the fact that on September 17, 1903, plaintiffs herein, as trustees, conveyed by deed of general warranty to Catharine Zitscher said real estate, but sets up by way of defense that said deed did not convey to her the fee simple title in said property, and in support of that claim there is set forth in the answer a copy of the deed from John Vaughan to George B. Vaughan and James P. Vaughan, trustees, recorded in deed book 839, page 241, of the records of deeds of Hamilton county, Ohio; and asserts that said deed in fact did not vest a fee simple title to said premises in said trustees, but said trustees are entitled to only an undivided interest in the same as heirs of John Vaughan, deceased, by reason of the fact of the omission from said trust deed of the word "heirs" or other words of perpetuity, and asks to be relieved from their liability under said mortgage.

Plaintiffs have filed a demurrer to this answer and the question raised thereby is whether or not the word "heirs" or other words of perpetuity in a trust deed are necessary to vest a fee simple title in a trustee.

The deed from John Vaughan to George B. and James P. Vaughan, trustees, conveys lots 1, 2, 3 and 4 of the subdivision of the estate of George Vaughan, deceased, made in proceedings in partition in case No. 3885 of the common pleas court of Hamilton county, Ohio, wherein Liberty Vaughan et al. were plaintiffs and John Vaughan et al. were defendants, as recorded in book of records of deeds of Hamilton county, Ohio.

The terms of this deed are as follows:

"Whereas the said John is desirous of improving certain real estate now to him belonging and hereinafter described, to the end that the same and the proceeds thereof may be by him better enjoyed during his lifetime; and whereas the said John Vaughan is desirous of making such disposition of his property as will enable the same to be disposed of before or after his decease in such manner and at such times as will preserve the same from possibility of sacrifice, and will insure to himself and his children, as hereinafter named, the most desirable results therefrom; now, therefore, this indenture witnesseth that said John Vaughan, in consideration of the sum of one dollar in lawful money of the United States, and other good and valuable considerations, to him paid by the said George B. Vaughan and James P. Vaughan, receipt whereof is hereby acknowledged, has granted, bargained, sold, released, confirmed and conveyed, and by these presents does grant, bargain, sell, release confirm and convey to and unto the said George B. Vaughan and James P. Vaughan, and their successor hereinafter designated, as trustees, to

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and for the uses and purposes hereinafter set forth, all of the certain lots, pieces or parcels of land now to him belonging and lying, being and situated in Delhi township, Hamilton county, Ohio, and more particularly hereinafter described, as also all other real or personal property now to him belonging wherever situated, with the reversion and reversions, remainder and remainders, rents, issues, profits and proceeds thereof and therefrom arising in any manner whatsoever, and all the right, title, interest, possession, claim and demand whatsoever, as well at law as in equity, of the said John Vaughan in and to the same. [Then follows the description of the property.] The same to be held in trust and to and for the uses and purposes hereinafter named, hereby giving and granting to the said George B. Vaughan and James P. Vaughan, and their successor hereinafter designated, as trustees, full power and authority to rent, lease, sell, mortgage, or in any other manner encumber or dispose of said real estate, or any part or parcel thereof, at public auction or by private contract, upon such terms, at such prices, and at such times and places as said trustees shall deem expedient; and also to execute, deliver and receive such instruments, assurances and conveyances as shall be requisite therefor. I hereby further authorize my said trustees and their successors to grade, street, subdivide and make such improvements in, upon and about such real estate or any portion thereof as they may, in their judgment, deem to be to the betterment thereof, including the erection of new buildings thereupon preparatory to the sale thereof, thereafter or at such time or times as they may deem to be expedient. I further empower my said trustees at their discretion to purchase at public sale any real estate on which they may hold a mortgage, to protect said trust fund, and hold and dispose of such purchased realty as they may deem to be expedient. I further direct that if either of the two trustees herein named die, resign, or become incapacitated before the completion of the trust, that the survivor shall continue to execute the provisions of this deed alone, and such survivor as successor shall be clothed with all the powers and be subject to all the provisions hereinbefore and hereinafter provided for said two trustees named. I hereby direct that the proceeds resulting from the disposition of the property hereby so conveyed in trust and coming into the hands of my said trustees hereunder shall be applied as follows."

He further provides in the deed that out of said trust funds he shall be provided during his life with suitable means of support and for the distribution of the residue thereof amongst his children.

Numerous authorities have been cited to the court relative to the question as to whether the trustees took a fee simple title to the property, so as to enable them to sell and convey to purchasers a fee simple title in said real estate. Among the authorities cited on this question, the court will call attention to the following:

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Volume 1 Jones, Real Prop. Sec. 593, p. 488, lays down the rule:

"There is an exception to the rule that the word 'heirs' is necessary to create a fee in case of a trust. When upon the face of the deed it appears that the conveyance is in trust for a use, the full purpose of which requires, or may possibly require, the vesting of a fee in the trustees, he is held to take an estate in fee simple without the use of the word 'heirs' as a word of limitation upon the estate conveyed. Thus, a deed to trustees and their successors in trust to sell and convey in fee simple absolute, without the word 'heirs' in either the habendum or granting clause, conveys to the trustees an estate in fee simple." (Citing numerous authorities in support of the rule.)

Volume 1 Washburn, Real Prop. (6 ed.) Sec. 149, p. 75, says:

"Trustees, however, take a legal estate commensurate with the equitable estate, and that only, without regard to the words of limitation used. The trustee will take whatever legal estate is necessary to enable him to carry out the trust. * * * Thus a grant to A B in trust to sell carries a fee."

Volume 27 Am. & Eng. Enc. Law (1 ed.) 107 says:

"In order that the trustee may acquire any estate or interest in the property conveyed, some power must be reposed in him or some duty imposed upon him, that will constitute him more than a mere repository of the title; * * * The estate of the trustee is commensurate with the powers conferred by the trust and the purposes to be achieved by it. Whatever estate is needed to effectuate the settlor's intention in creating the trust, even to a fee simple, the trustee acquires; * * * It matters little what form of words has been employed to create the trust * * * the doctrine just stated being universal—that is to say, that despite the language of the instrument, whatever estate is necessary for the full execution of the trust, vests in the trustee."

In *Angell v. Rosenbury*, 12 Mich. 241, 265, the court says:

"In a conveyance *in trust for the sale* of the land and real estate and * * * for the payment of debts from the proceeds—in such a case we do not think the word 'heirs' is necessary to convey a fee * * * the trustee must be held to take an estate as large as may be necessary for the purposes of his trust, whether the conveyance contained words of inheritance, or not."

In *Ewing v. Shannahan*, 113 Mo. 188, 193 [20 S. W. Rep. 1065, 1066], the court says:

"The deed in question would pass a fee simple estate to the trustee; for though, in general * * * words of inheritance are necessary to pass a fee, yet there are exceptions to the rule. Thus, when lands are devised or conveyed to a trustee without the use of the word 'heirs,' and it is necessary that the trustee should take an estate of inheritance in order to enable him to carry out the intention of the donor, he will take an estate in fee simple."

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The circuit court of Hamilton county in the case of *Stephenson v. Sedam*, 5 Circ. Dec. 609 (12 R. 408), holds that,

"No synonym will supply the word 'heir' in a deed, and no circumlocution has ever been held to create a fee, except in case of a conveyance in trust. The trustee will take the legal estate in fee, though limited to heirs, without the word 'heirs,' if the trust which he had to execute be to the *cestui que trust* and his heirs."

And in the opinion, page 613, the court adopts the language of 1 Washburn, Real Prop. Sec. 53:

"That in the case of a conveyance in trust, the trustee will take the legal estate in fee, though limited to him without the word 'heirs,' if the trust which he has to execute be, to the *cestui que trust* and his heirs, * * * because without such a construction the trustee would not be able to execute the trust. * * * Thus a grant to A in trust, to sell, carries a fee."

The Supreme Court of Ohio in the case of *Brown v. Bank*, 44 Ohio St. 269 [6 N. E. Rep. 648], Syl. 1 and 2, had occasion to construe a mortgage in which the word "heirs" or other words of perpetuity were omitted, and held:

"By a well-established general rule the use of the word 'heirs,' or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee simple estate; but this is not an inflexible rule admitting of no exception or qualification.

"Where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument cannot otherwise be carried into effect, it will be construed to pass such estate, although the word 'heirs' or other formal word of perpetuity are not employed."

Counsel for defendants in this case cited the court to *Miles v. Fisher*, 10 Ohio 1 [36 Am. Dec. 61] as supporting their contention that a fee is not vested in the trustees under said deed. But upon examination it will be found that the case is not, in the judgment of the court, analogous to the case at bar. And again the case of *Miles v. Fisher*, *supra*, was questioned as an authority by the Supreme Court in *Williams v. Presbyterian Soc.* 1 Ohio St. 478, 503, where the court said with reference to that case:

"But it is to be observed, that the question whether they took a fee, does not seem to have been argued, and the case as to the point now under consideration, is, possibly, of doubtful authority."

In view of the power and authority expressed in the trust deed in question and the law as hereinbefore cited applicable thereto, the court is of the opinion that the use of the word "heirs," or other words of perpetuity, was not necessary in said trust deed to vest in the trustees the fee simple title to the property in question. The face of the deed

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shows the purposes and power of sale given to the trustees; and to carry out the uses for which the deed was made the omission of the word "heirs" is not fatal, for such a deed must necessarily convey to the trustees an estate in fee simple to enable said trustees to execute the trust fully. As to the omission to name successors, this also would avail nothing, as such sales made by the present trustees at least would be valid and vest a fee in the purchaser. This question might never arise if all the property should be disposed of by the trustees prior to their death, and, if not, then new trustees might be appointed to carry out the object of the trust if found necessary. The demurrer of the plaintiffs to the answer of the defendants will, therefore, be sustained.

RES JUDICATA.

[Superior Court of Cincinnati, General Term, January 10, 1906.]

Ferris, Hosea and Hoffheimer, JJ.

MARTIN MACK v. ALBERT ECKERLINE.

FACT IN ISSUE IN COURT OF COMPETENT JURISDICTION AND DULY DETERMINED IS
RES ADJUDICATA IN COLLATERAL SUITS BETWEEN THE SAME PARTIES.

If the record in a cause indicates that a matter must of necessity have been adjudicated prior to the rendition of the judgment, this will be conclusive in a subsequent action upon the fact that the question has been decided, and the decision may be invoked as *res adjudicata*.

[For other cases in point, see 5 Cyc. Dig., "Judgments and Decrees," §§ 944-975; 7 Cyc. Dig., "Res Adjudicata," §§ 244-252, 277-284.—Ed.]

ERROR to special term.

Closs & Luebbert, for plaintiff.

Norwood J. Utter, for defendant.

BY THE COURT.

The findings of fact entered by the court below cover grounds of affirmative relief sought in this suit, but which were litigated as defenses in a prior action between the parties in forcible entry and detainer, brought before a magistrate, with a resulting judgment adverse to the plaintiff in error here, which judgment was in due course affirmed by the common pleas and by the circuit court. See *Mack v. Eckerlin*, 27 O. C. C. 133.

Granting that under Rev. Stat. 6610 (Lan. 10192), said former judgment is not a bar to the bringing of this suit, yet we regard it as none the less true that a fact in issue in a court of competent jurisdiction

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and duly determined, is *res adjudicata* in collateral suits between the same parties.

Where the record of a case shows that a question must necessarily have been determined before the judgment which was rendered, it is conclusive in all subsequent litigation upon the fact that the question has been litigated and decided, and the party may invoke that decision upon the principle of *res adjudicata*. *Hixson v. Ogg*, 53 Ohio St. 361 [42 N. E. Rep. 32]; *Kunneke v. Mapel*, 60 Ohio St. 1, 7 [53 N. E. Rep. 259].

Strictly speaking, the court below should, perhaps, have excluded evidence of the facts so adjudicated, but if this be error it cannot prejudice the plaintiff in error here. The proper forum for relief was the court of common pleas during the pendency of the former action.

To hold otherwise would compel this court to sit in review upon the action of the magistrate, the common pleas and the circuit court, which is manifestly improper. *Brennen v. Cist*, 9 Dec. 18 (6 N. P. 1); *Petsch v. Mowry*, 13 Dec. Re. 401 (1 Cin. 36).

A court cannot do by indirection what it is not authorized to do directly.

Judgment affirmed.

BENEFICIAL ASSOCIATIONS—INSURANCE.

[Superior Court of Cincinnati, Special Term, January, 1906.]

MARY HERRON V. CATHOLIC KNIGHTS OF ST. JOHN.

PLAINTIFF SUING ON FRATERNAL ASSESSMENT POLICY NEED NOT SHOW THAT ASSESSMENT LEVIED WILL NOT PRODUCE MAXIMUM AMOUNT NAMED.

In an action against a fraternal beneficiary society for the recovery of decedent's insurance, which under the scheme of the order was to be realized by a *per capita* assessment of the members, plaintiff is not required to prove that such assessment, if levied, would be sufficient to produce the maximum amount named in the certificate; the adequacy of the assessment is a matter of defense.

[For other cases in point, see 1 Cyc. Dig., "Beneficial Associations," §§ 162, 163, 170, 171.—Ed.]

MOTION for new trial.

Frank M. Gorman, for plaintiff.

Otway J. Cosgrave, for defendant.

HOFFHEIMER, J.

This was an action to recover money on two certificates of insurance in a certain beneficiary fund of defendant order. The two certificates of insurance were set out, and by them it appears that the insurance

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in each case was for an amount to be realized by a per capita assessment from the members of the order, participating in said fund, which amount (in each certificate) shall not exceed the sum of \$500.

The petition further claimed that request had been made for proof of death form; likewise defendant's failure to furnish same; proof of death furnished proper authorities, and averment that payment was to be made within sixty days according to the rules and regulations of the order. There was an averment that neither the face of the petition, nor any part thereof, had been paid, although more than sixty days had elapsed; plaintiff had complied with all the conditions; that demand was made for payment; that defendant refused to pay the same.

Defendant substantially denied liability.

At the conclusion of plaintiff's case there was a motion for a directed verdict, and it was claimed that there was a failure of proof as to the person upon whom demand was made, and as to the character and amount demanded; and also, that there was no allegation and proof that an assessment was levied, or if levied, that it would produce the maximum amount named in the certificate.

Upon the question raised with reference to demand, I am of opinion the court's action was warranted by *Protective Union v. Whitt*, 36 Kan. 760 [14 Pac. 275; 59 Am. Rep. 607]. In that case demand was held to be unnecessary.

Upon the question raised by defendant, as to the assessment, I was of opinion at the trial, and still adhere to the view then taken, that it was a matter for the defendant to show that the assessment, if levied, would not produce the maximum amount set out in the certificates. As no evidence was introduced by defendant that it levied an assessment, and therefore, that the maximum amount would not be produced, I instructed the jury that if plaintiff was found to be entitled to a verdict, she was entitled to recover the maximum amount named in the policies. Upon this question, it is true, there is a diversity of opinion, but I think the rule invoked is the fair and just rule, and I find it applied in many well considered cases of this character. The plaintiff in such case is not in a situation to properly present the evidence required, while on the other hand, the defendant knows who its certificate holders are; it knows its outstanding policy holders; it has exact knowledge as to its lapsed policies; it is in possession of all books, official papers, vouchers and accounts with its numerous members and subsidiary branches; in short it has and can furnish all the information vital to a just and proper determination of the amount due, if anything is due. If the burden were not upon it to show that the beneficiary is not entitled to the sum sued for, this "scheme of insurance" to quote from a similar case, "would be a delusion and a snare." *Lueders v. Insurance Co.* 12 Fed. Rep. 465; see

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also, *Supreme Council A. L. of H. v. Anderson*, 61 Tex. 296; *Elkhardt Mutual Aid B. & R. Assn. v. Houghton*, 103 Ind. 286, 287 [2 N. E. Rep. 763; 53 Am. Rep. 514]. Other decisions to the same effect might be cited; indeed, it will be found that the view herein expressed is sustained by many well considered cases.

In the elaborate and able brief submitted by defendant, other reasons are advanced for a new trial, involving matters upon which the court had occasion to pass during the trial.

After examining the authorities which have been cited, I can find no valid reason for interfering with the verdict, and as there was evidence to justify the jury in taking the view it did, the verdict must be permitted to stand.

The motion for a new trial must be overruled.

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ASSESSMENTS—BILL OF EXCEPTIONS—ERROR.

[Superior Court of Cincinnati, General Term, July 28, 1906.]

Ferris, Hoffheimer and Murphy, JJ.

(Judge Murphy of Hamilton common pleas, sitting in place of Judge Hosea.)

SARAH H. HOPPLE ET AL. V. CINCINNATI (CITY), ETC.

1. NOTICE OF SIDEWALK ASSESSMENT MUST BE MADE ON LEGAL OWNER.

Service of notice of an assessment for a sidewalk improvement, on the equitable owner of abutting property, is insufficient, as such service must be made on the holder of the legal title.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 1253-1260; 1 Cyc. Dig., "Assessments," §§ 196-222.—Ed.]

2. DEFECT IN BILL OF EXCEPTIONS WILL NOT PREVENT JUDGMENT FOR PLAINTIFF IN ERROR IF RECORD SHOWS WANT OF SERVICE.

Where the record in a proceeding in error shows beyond question an insufficiency of service on the defendant in the original action, the fact that the bill of exceptions filed by such defendant, now plaintiff in error, fails to disclose that it contains all the evidence submitted at the trial will not prevent judgment's being rendered in favor of plaintiff in error on the ground of such defective service.

[For other cases in point, see 1 Cyc. Dig., "Bill of Exceptions," §§ 136-185.—Ed.]

ERROR to special term.

Burch & Johnson, for plaintiffs in error.

F. W. Browne, for defendants in error.

FERRIS, J.

This Sarah H. Hopple and Casper V. T. Hopple v. Cincinnati (City), for use of Contractors' & Builders' Supply Co., was an action to enforce a lien obtained in the laying of a sidewalk on Spring Grove avenue in this city. The question that is made the basis of this opinion is the sufficiency of the service. The record on this point discloses the following facts in their chronological order:

The resolution to improve said street was read September 6, 1901. A second reading was had on September 7, 1901. A third and final reading was had on September 9, 1901. Notice of the passage of this resolution was given on October 14, 1901, by legal service on Casper V. T. Hopple. No other service was had on any of the defendants.

It is important to note that the sidewalk was not constructed prior to September 15, 1902. The proper board authorized the construction on May 20, 1902.

The sidewalk in question was constructed on lot 41 of J. and R. B. Hopple's second subdivision, the legal title to which was at the time of the passage of the resolution and the time of the service of the notice on Casper V. T. Hopple, in Sarah H. Hopple and not in Casper V. T.

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Hopple. Under the provisions of original Rev. Stat. 2304 (Lan. 3603; B. 1536-212; 90 O. L. 211), service should have been had upon Sarah H. Hopple as "the owner of the property." It matters not for purposes of this case that this court subsequently, on April 8, 1903, found that the legal title to the property was then in Sarah H. Hopple as trustee for Casper V. T. Hopple. The authorities are clear in defining duties with reference to service:

"The owner of property for the purpose of assessment is meant the legal, and not the equitable, owner." Cooley, Taxation (3 ed.) p. 731; *People v. Seaman's Friend Soc.* 87 Ill. 246.

We are urged to dismiss the petition in error and deny consideration to the above for the reason stated, that the bill of exceptions is fatally defective in failing to disclose that it contains all the evidence submitted on the trial.

The facts upon which this opinion is based are record facts. They are facts relating to service that are undisputed. In the nature of things, the facts are complete and full as to the question here being considered, and as they appear, the owner of the property was never served with notice as required by law, and therefore the assessment against this property was invalid, and for this reason the judgment below is reversed.

Hoffheimer and Murphy, JJ., concur.

ANNUITIES—EXECUTORS AND ADMINISTRATORS.

[Superior Court of Cincinnati, Special Term, July, 1906.]

CENTRAL TRUST & SAFE DEPOSIT CO. v. JOSIAH MARSHALL KIRBY ET AL.

ANNUITY MAY BE ASSIGNED AND ESTATE MAY BE DISTRIBUTED IF ANNUITANTS ASSIGN THEIR INTEREST TO THOSE ENTITLED TO CORPUS OF ESTATE.

An annuity provided for by the will of a decedent may be transferred or assigned as any other property; and when all other claims against an estate have been satisfied and the estate is otherwise fully ready for distribution, a provision for the payment of annuities during the life of the annuitants will not stand in the way of a final distribution when it appears that the annuitants have, for a valuable consideration, transferred to the parties entitled to the corpus of the estate their entire right, title and interest therein.

[For other cases in point, see 1 Cyc. Dig., "Annuities," §§ 1-28; 4 Cyc. Dig., "Executors and Administrators," §§ 539-542.—Ed.]

Drausin Wulsin, for plaintiff.

Hoffman, Bode & LeBlond, for defendants.

FERRIS, J.

This action brought by the executors under the last will and testament of Josiah Kirby, deceased, against Josiah Marshall Kirby, Carroll White Kirby, Dorothy Kirby, and Elizabeth Kirby, a minor under

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the age of fourteen years, seeks a construction of the will so far as it relates to the duties of the plaintiffs as executors, and submits to the court for determination three propositions as follows: First, whether the time has now arrived for a final distribution of the estate; second, it appearing that the parties who are entitled to the *corpus* of the estate having purchased the annuities, and there being no creditors, whether the distribution can be had notwithstanding the provisions relating to the annuities; and third, whether the provisions of the will necessitate any duties on the part of the executors as called for by a construction of items nine and ten of the will.

The facts in the case are not in dispute. The conclusions of law are to be predicated upon the following salient facts: Josiah Kirby left a last will and testament properly probated, and under item five of the same provided for the payments of \$200 each to four annuitants; and using the following language at the close of clause 5, referring to the annuities he said: "All to be paid out of the net income of my estate."

The court is led to believe by the producing of receipts from each one of the parties entitled to the annuities under the will that they have been fully paid and satisfied, as will be seen by a reading of one of the receipts, the language of the others being exactly similar to this one, which reads as follows:

"Cincinnati, Ohio, June 20, 1906.

"In consideration of one dollar and other valuable considerations to me, paid by Josiah Marshall Kirby and Carroll White Kirby, the receipt whereof is hereby acknowledged, I, ———, do hereby assign, set over and transfer to the said Josiah Marshall Kirby and Carroll White Kirby all my right, title and interest in and under the will of Josiah Kirby, late of Hamilton county, Ohio, and I do hereby release the Central Trust & Safe Deposit Company and Alexander Hill, executors of the estate of said Josiah Kirby, from the payment to me of the annuity of two hundred dollars as set forth in said will, and I hereby direct said executors and their successors to turn over to Josiah Marshall Kirby and Carroll White Kirby any and all stock or other property which they may now have in their possession in trust for the payment of said annuity."

There is in evidence nothing to indicate that these receipts do not mean exactly what they say; they were not obtained by any of the means that have in some of the cases, read by the court, justified an examination for the purpose of ascertaining whether or not they were proper receipts; but in view of the expression contained in item eight it is necessary to do more than make a casual examination of these receipts as mere evidences of payment, because by the terms of the item the executors are directed to do certain other things with the "net income." The will being regarded as an entirety and the estate as an en-

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tirety, the principal of the estate is to be regarded exactly as the testator regarded it, as being one of the component parts of the estate to be subjected in the manner set forth in the will, distinct and different from the income of the estate, or the net income, as he speaks of it, for the net income was to be used for the support of his two children during minority in the manner provided in the will, and the net income was likewise to furnish funds for the payment of the annuities.

Item eight contains these words: "All the rest and residue of my estate I give, devise and bequeath to my two sons, share and share alike, subject to the conditions and limitations of this will; said estate to be held and managed by my said executors named, until my youngest son, Carroll, becomes of lawful age, when the said estate is to be divided by my executors and finally settled."

It is therefore apparent that the court having an exclusive jurisdiction in the matters relating to the administration of estates, should determine that no distribution final in its character could be made in this or any other estate until it affirmatively appeared that all and singular the provisions of the will had been fully complied with.

Manifestly no distribution could be had while there were unsatisfied claims and demands against the estate, while there were outstanding credits and creditors whose outstanding claims had not been liquidated, or while there were any conditions not executed. Therefore, if it should appear that the donor created a trust from the necessities of the case covering a period of time not reached at the time distribution was sought, the court would make proper reservation to meet the contingencies required by the instrument. This it seems was done, and the record before the court indicates an account filed by the executors showing partial distribution and complete distribution so far as all claims of all persons are concerned except only the annuitants. To meet the obligations created by the will, a fund was set aside now in the hands of the executors, for which distribution is sought. The object therefore of this petition is to obtain from the court a proper construction of this will.

Two or three things seem proper to state by way of introduction to the real question that is here to be decided. It is the duty of every court construing a will to ascertain primarily the intention of the testator. It is the duty of the court to give such construction to a will as that it may stand as an entirety. If there be an irreconcilable difference, then certain other rules of interpretation have been followed as the court believes applicable to this particular case.

Judge Upson, in the case of *Stewart v. Todhunter*, announced a rule, which has not been disturbed in this state, that distribution is the object of all administration, and that the court will give such an interpretation of the will as will enable those who are beneficially interested in the estate to come into their own. Executors and trustees are incidents

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to administration, necessary but always secondary, but while the court invariably protects its own officers and will not permit by operation of rules of court its own officers to be mulcted or to suffer loss, yet it will bear primarily in view the fact that wills are made to carry out the intentions of those whose estates are before the court for distribution to legatees. I find on examination that the books are clear in holding that an annuity is a legacy, and differs in nowise from any other provision payable *in solido*. An annuity differs in nowise from any other interest in a decedent's estate. It is only the form and the kind that gives rise to the expression. It is an annual payment determined by the length of life of the annuitant, limited as a rule to his life not for the purpose of enabling him to hold it for a specific purpose, but like any other interest is transferable and assignable, and differs in nowise from other legacies so far as the laws of assignability are concerned. The case has not been specifically passed upon in this state, but we have borrowed practically all our surrogate acts from New York and Massachusetts, and I find these rules obtain in those states. And there is no reason in the nature of things why it ought not to obtain in this state.

But the testator provides for distribution at the time that the youngest child shall attain his majority (item eight). That time occurred in April of the year 1906. He provides then for final distribution. This, as the court has already said, could not be done while there is an outstanding obligation. Is there now at this time in July of 1906, such a state of affairs as would warrant the court in saying that the time of distribution now had not arrived? No estate can be distributed as long as the trust remains unexecuted. This trust is not executory. It will have been fully completed and will become an executed trust and no duties will remain when all creditors have been paid and when there exists no obligation to pay the other final distributees of the estate. This distribution can be safely had within the rules of law at this time, for by every token that obtains the defenses would be numerous against any person seeking to subject this estate to the payment of any claim under this will by an annuitant or transferee of the annuitant after the signing of the receipts that are now before the court. The law of estoppel would prevent the setting up of any claim that would create an obligation or be binding upon the executors and trustees of this estate.

The practical answer that furnishes a strong reason will be found in the answer to the question. What shall these executors do now? Manifestly the fund now in their hands exists only for a single purpose, payment of the income to the annuitants. These annuitants having assigned their interest with directions to pay the estate to the persons who are named in item eight as the ones entitled to distribution, it would be a travesty if the court were to hold the estate open to pay them themselves out of their own estate these annuities which they now hold by virtue of these assignments. They are entitled to come into their own,

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and the answer to the questions, therefore submitted to the court is as follows:

"This estate under item eight was ready for distribution at the arrival of age of Carroll Kirby, on his producing to the satisfaction of the executors of the estate receipts showing that there were no outstanding obligations of any character against the estate. The executors having paid all of the indebtedness of Josiah Kirby, and the heirs having paid all of the annuities provided for by that will, made it entirely possible for the court having exclusive jurisdiction of the settlement of estates to say of this trust, it has been fully executed."

I desire as an addendum to review in a brief sentence other questions to which counsel has called the attention of the court relating to the clause in the will that provides that in the event of the death of one that his estate should pass to the other. That condition, fortunately, in fact has not arisen, and this court has now before it the two persons in the will. Each is entitled to an undivided one-half of the estate at the time of distribution, and when the court having before it this estate shall have presented to it the facts as appear before this court, there will be no difficulty whatever because no facts were warranted in passing upon the fractional part that each will receive, to wit, one-half of the estate. No one is heir of the living, and therefore the court has determined that the minor is not a necessary party to the suit, having no interest therein, and for that reason has declined to appoint the guardian *ad litem* or to permit the answer that has been submitted to be filed representing, as the court believes, no interest in this estate.

NEGLIGENCE—PLEADING.

[Licking Common Pleas, September Term, 1906.]

WILLIAM VANATTA V. BALTIMORE & O. RY.

1. PLEADING OF A DEFENSE OF CONTRIBUTORY NEGLIGENCE.

A defense of contributory negligence must specifically set out the facts relied upon as constituting such negligence.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 528-530.—Ed.]

2. MANNER OF OBJECTING TO DEFECTIVE ALLEGATIONS OF CONTRIBUTORY NEGLIGENCE.

A motion to strike a defense of contributory negligence from the answer as being defective in that it does not plead specifically the facts relied upon as constituting such negligence is not proper, but the court may treat it as a motion to make more definite and certain and may order such defense to be so corrected.

[For other cases in point, see 6 Cyc. Dig., "Pleadings," § 1415.—Ed.]

[Syllabus approved by the court.]

Smythe & Smythe and Russell & Horner, for plaintiff.

Kibler & Montgomery, for defendant.

Vanatta v. Railway.

SEWARD, J. (Orally.)

The case of William Vanatta against the Baltimore and Ohio Railroad Company is submitted to the court upon a motion to strike from the answer the second defense. The second defense is a plea of contributory negligence, without setting out what acts constitute the contributory negligence. This court held in the case of Rector against the Columbus, Buckeye Lake and Newark Traction Company, and Priest against that company that a pleading setting up contributory negligence, without setting out the acts constituting the contributory negligence, is not good pleading; and the court cited at that time, without reading it, *McInerney v. Chemical Co.* 118 Fed. Rep. 653, which seems to be decisive, if it is good law, of this contention. Counsel for the defendant have cited the court to the decision of Judge Beldon of Butler county, I believe, which holds to the contrary, and there is some difference of opinion of courts regarding this; and, as the court said in deciding the Priest case, the matter has never gone to the Supreme Court and been decided by it; but the court thought that good reason indicated that a defendant who pleaded contributory negligence as against the plaintiff's claim should be held to the same rule of pleading as the plaintiff would be held to if a pleading were filed charging the defendant with negligence without stating what acts constitute the negligence, and a demurrer would be good to that, or a motion to make it more definite and certain, by setting out the acts which constitute the negligence. And why should not the same rule apply to the plea of contributory negligence? The court thinks it should, and the matter ought to be presented to the Supreme Court, and let that court pass upon it.

This case, *McInerney v. Chemical Co. supra*, is a case decided by the circuit court of South Carolina:

"Contributory Negligence—Pleading: Under the rule of code pleading that the facts relied on be stated in a clear and concise manner, an answer alleging that the injuries causing the death of plaintiff's intestate arose from his carelessness, negligence and fault may be required to be made more definite."

The court say:

"These are motions to make the answer and the amended answer more definite and certain. The complaint seeks damages for personal injuries to the plaintiff's intestate caused by the alleged negligence of defendant. It states that the intestate was a stevedore at work, unloading cargo from a steamship at defendant's wharves; * * *.

"The mode of presenting the defense of contributory negligence used by the defendant in this case is in accordance with the practice which has prevailed in South Carolina since the adoption of code pleading, in 1870. No question has been made of it at any time,—at least, none which has been passed upon in any reported case. It is therefore *res integra* in this jurisdiction. But if the practice be tested by the

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rules of code pleading, it will appear that it is defective. The rule governing all code pleading—complaint and answer—is, that the facts relied upon be stated in a clear and concise manner, and from the facts so stated the legal conclusion is drawn.”

That is, the facts shall be stated in a clear and concise manner, and not conclusions from the facts.

“If a defendant charged with negligence relies on contributory negligence on the part of the plaintiff, he must plead it specially, and when pleaded the burden of proof is on him to maintain it. *Indianapolis & St. L. Ry. v. Horst*, 93 U. S. 291, 298 [23 L. Ed. 898]. It is an affirmative defense in the nature of a plea of confession and avoidance. This defense goes further than a general denial. Under the defense of a general denial, the plaintiff must prove that the negligence of the defendant was the proximate cause of the injury. And the defendant can introduce any evidence contradicting that. He may show that his conduct in nowise contributed to the injury, and may go farther, and show that the injury was caused wholly by the act of the plaintiff. But where he sets up the defense of contributory negligence, he, in effect, says: ‘It may be true that I was negligent, but at the same time I can show that you also were negligent, and so notwithstanding my negligence you cannot recover.’ In other words, by inserting this defense, he introduces new matter,—other facts, which, if they do not justify him, debar the plaintiff. And under the rule of code pleading he must set out concisely these facts from which the legal conclusion can be drawn. Before the plaintiff can recover, he must set out, as well as prove, the specific acts of defendant by which negligence will appear; and so, when defendant relies for his defense on the contemporaneous negligence of plaintiff, he must set out the facts,—the specific acts of plaintiff by which his negligence will appear. To put it another way: If a defendant wishes to rely upon the rule that the plaintiff must prove his case, the general denial would accomplish his purpose. But if he intends to go beyond this, and to avail himself of a defense, notwithstanding that negligence may be proved against him, by showing contributory negligence on the part of the plaintiff, he must state his facts upon which he relies, from which negligence could be inferred.”

So, the court is abundantly satisfied with its former holding.

Mr. Flory: What page is that?

The court. Page 653. And thinks that is supported by both reason and authority.

Now, this is a motion to strike this second defense from the answer. The court does not think that motion can be sustained, but the court will treat it as a motion to make more definite and certain, and will order the second defense in the answer to be made more definite and certain, and exceptions.

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BONDS—DRAINS AND DITCHES—WATERS AND WATER COURSES.

[Defiance Common Pleas, 1906.]

ANDREW M. ANDERSON ET AL. V. HICKSVILLE (VIL.) ET AL.

1. CONSTRUCTION OF COUNTY DITCH LAW AS TO "LATERAL DITCHES."

Small streams tributary to the main streams, the improvement of which is petitioned for, are within the meaning of the terms "lateral, spur or branch ditch" in Rev. Stat. 4448 (Lan. 7629) providing for the petition for ditch improvements.

2. ESSENTIALS OF BOND FOR DITCH IMPROVEMENT.

An omission of the names of the sureties from the body of the bond given as required by Rev. Stat. 4451 (Lan. 7633) to be given with petition for county ditch improvements, the date of the filing of the petition, and that the words "deepening, widening, and straightening" were not inserted in the proper blank space, and that the petitioners signed as sureties, are not grounds for an injunction restraining the improvement of a ditch improvement which the county commissioners have found necessary.

3. VIEW NECESSARY BY COMMISSIONERS OF A PROPOSED DITCH IMPROVEMENT.

Revised Statutes 4452 (Lan. 7635) as to a view of the line of a proposed ditch improvement by the county commissioners does not contemplate that the commissioners must actually set foot on every inch of the line of the ditch; a meeting at the beginning of the improvement is sufficient.

[For other cases in point, see 3 Cyc. Dig., "Drains and Ditches," § 31.—Ed.]

4. INJUNCTION NOT PROPER TO DETERMINE NECESSITY OR BENEFIT OF DITCH IMPROVEMENT.

The necessity of a proposed ditch improvement, or the question of benefit to a party assessed, is not a proper subject for consideration by injunction; appeal from the decision of the commissioners is the proper remedy.

[For other cases in point, see 3 Cyc. Dig., "Courts," § 531; "Drains and Ditches," §§ 77-80.—Ed.]

[Syllabus approved by the court.]

Henry & Robert Newbegin, for plaintiffs:

D. F. Openlander, Harris & Cameron and G. D. Simmons, for defendants.

SNOOK, J.

These two cases [Andrew M. Anderson et al. v. Hicksville (Vil.) et al. and Brown Anderson et al. v. Defiance Co. (Comrs.) et al.] involve the validity of the same ditch proceeding, and were submitted to the court together; while there are some issues in one not found in the other, in deciding the cases I have discussed the questions involved as though they were raised on one petition.

On July 25, 1904, George Tracts and others filed their petition with the board of commissioners of Defiance county, Ohio, praying for the deepening, widening, and straightening of a certain ditch known as North Gordon creek, and its laterals, Middle Gordon creek and Mill creek. On the same day the petitioner filed his bond, signed by himself

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and several others, all signers of the original petition. The hearing was set for August 23, 1904, at the head of North Gordon creek; and the petitioner was required to cause notice of said hearing to be given all persons and corporations affected thereby, and of the time and place of said hearing. Notice was given and proof of the service thereof was duly filed in said proceedings.

On August 23, the commissioners met at the head of North Gordon creek, and heard the complaints of those present, and adjourned to September 19, 1904. On September 19, at a meeting of the board, they found that said improvement was necessary and established the same, and ordered the surveyor to survey and level the same, and apportion the cost of construction thereof; and fixed January 30, 1905, as the day for the next hearing in said matter. On January 30, said matter was continued to February 13. On February 13, the board met and partially confirmed the report of the surveyor, with certain amendments thereto; and on February 14, the board further amended said report and adjourned to February 27, at which time they met and passed on all claims for compensation and damage, and finally approved the report of the surveyor.

The plaintiffs seek to enjoin the construction of said improvement, and urge very many reasons why a court of equity should enjoin all further proceedings in the matter. The plaintiffs, and each of them, are owners of land lying along the line of said improvement assessed for the construction of the same. The first ground urged for consideration is, that North Gordon, Middle Gordon and Mill creeks are each separate water courses, and are not laterals, spurs, nor branch ditches, so that they can be joined in one improvement. The language of the statute, Rev. Stat. 4448 (Lan. 7629), is,

“The petition for any such improvement shall be held to include any side, lateral, spur or branch ditch, drain or water course, necessary to secure the object of the improvement, whether the same is mentioned therein” (petition) “or not.”

The evidence shows that all three ditches, down to the point of the junction of Middle Gordon with North Gordon, are small runs, without natural banks or bluffs, bearing the character of many of the small creeks in this country flowing through level lands. Mill creek is a tributary of Middle Gordon, and Middle Gordon of North Gordon; and the improvement of North Gordon below the point where Middle Gordon empties into it will affect both Middle Gordon and Mill creek, and the improvement of Middle Gordon below the point where Mill creek empties into it will affect both. So, it follows, that the statute referred to, if not made to cover such a case as this, will have no meaning whatever, and will apply in no case where there are several branches to a ditch improvement.

The second claim is, that there was no bond filed in the proceeding,

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or rather, that the paper purporting to be a bond is not such a bond as is required by law. The bond was filed in the proceeding with the county auditor, on July 25, 1904, and is signed by the petitioner and several other signers of the petition. It is claimed that signers of the petition for the improvement cannot become sureties on the bond. The language of Rev. Stat. 4451 (Lan. 7633), is,

"And there shall be filed therewith" (the petition) "a bond, subject to the approval of said auditor, payable to the state of Ohio, with at least two sufficient sureties, in not less than \$200, conditioned for the payment of all costs if the prayer of the petition be not granted."

That the petitioners may become sureties on the bond is settled by *Keys v. Williamson*, 31 Ohio St. 561. It is true that the Supreme Court there had under consideration the provisions of the township ditch law, now embodied in Rev. Stat. 4514 (Lan. 7763), but the language there used as to sureties is substantially the same as used in Rev. Stat. 4451 (Lan. 7633). The one says, "with at least two sufficient sureties," and the other says "with good and sufficient sureties." The *Keys* case therefore makes it clear that the petitioners for the ditch may become sureties on the bond. Neither does the fact that the county auditor did not indorse his approval on the bond render it void. The language of Rev. Stat. 4451 (Lan. 7633) is, "A bond, subject to the approval of said auditor." There is no provision that his approval must be indorsed on the bond. The auditor identifies the bond now found among the files as the one filed with him in the matter, on July 25, 1904, and says that he then approved it. Besides the rule is, if a bond is delivered for approval to the proper officer, it becomes a binding obligation, unless actually disapproved. See note C, to *Ramsey v. People*, 90 Am. St. Rep. 177, 190 [197 Ill. 572; 64 N. E. Rep. 549]; *Place v. Taylor*, 22 Ohio St. 317, 320.

Is the bond void because the names of the sureties were left out of the body, because the date of the filing of the petition for the ditch is left blank, and because there were not filled in the blank in the body of the bond the words "deepening, widening, and straightening?" This question is discussed in the cases referred to in the note to *Ramsey v. People*, *supra*, page 197, and, without quoting from it at length, we think these cases make it plain that such omissions from the body of the bond do not make the bond void. Moreover, I have examined the opinion of Judge Killits, in the case of *Cooper v. Van Wert Co.* (Comrs.) 16 Dec. 638, and have conferred with counsel as to the decision of the circuit court in that case, and am not yet prepared to say that this authority settles the question, that a defect apparent on the face of a bond filed in a county ditch proceeding is ground for an injunction.

It must be remembered, in a discussion of this question, that the decision of the Supreme Court in the case of *Sessions v. Crunkilton*, 20 Ohio St. 349, construed the provisions of the township ditch law,

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and that the court, in that case, were nowise called upon to offer an opinion as to the provisions of the county ditch law. As I read this decision, it turns on the wording of the statute, which requires that the bond must be filed before the trustees can take any steps to establish the ditch.

The language of the statute there under construction is now embodied in Rev. Stat. 4514 (Lan. 7763), and reads: "Before the trustees can take any action towards locating or establishing any ditch, there shall be filed with the township clerk * * * a bond with good sufficient sureties;" and Rev. Stat. 4520 (Lan. 7770) provides, "If the trustees find that the bond has been filed and notice given, they shall proceed."

It will be observed that these statutes clearly make the giving of the bond a condition precedent to any action on the part of the trustees, and a careful reading of the case of *Sessions v. Crunkilton*, *supra*, will show that the discussion of the court is based upon the provisions of these two statutes to which I have referred. The county ditch law contains no such provisions, and makes no such limitation to the powers of the commissioners. Under the provisions of the county ditch law, the prayer of the petition having been granted, and an order made establishing the improvement, I doubt if the Supreme Court would enjoin the construction of a county ditch for want of a bond. But, we think, this question of the right to enjoin because of defects in the bond is answered by the Supreme Court in the case of *Haff v. Fuller*, 45 Ohio St. 495 [15 N. E. Rep. 479], see opinion, page 497, where the court say:

"In this state, the proceedings and final orders of township trustees and county commissioners establishing ditches and roads * * * may be reviewed by petition in error, and reversed for errors appearing on the record. * * * The remedy thus afforded being adequate for the correction of errors in such proceedings which are disclosed by the record, the rule already stated has been applied in such cases, though the errors so appearing rendered the proceedings void for want of jurisdiction."

See also *Frevert v. Finfrock*, 31 Ohio St. 621, 627, where the court say:

"Where the regularity of the proceedings is the ground of objection, the claimants will not be permitted to resort to the remedy of injunction, but will be confined to his appeal, or, if the proceedings are so erroneous as to be reversible, to his petition in error."

See also *McClelland v. Miller*, 28 Ohio St. 488. These cases make it plain that in a ditch proceeding injunction will not lie because of errors apparent on the face of the record.

It is further claimed that plaintiffs did not have legal notice of the proceeding. It is first claimed that the notice to meet at the beginning of North Gordon is not sufficient to satisfy the language of the

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tute. The statute, Rev. Stat. 4451 (Lan. 7634), says that the notice shall set forth the substance, prayer and pendency of the petition. The notice, as served, complies with this language. Moreover, it is disclosed by the record and testimony that the plaintiffs took part in the proceedings at different stages, and this would take the place of notice. It is complained that the notice to nonresidents is not good because it failed to name the landowners to whom it was directed. This contention is answered by the Supreme Court, in *Miller v. Graham*, 17 Ohio St. 1, 8, where it is held that notice similar to that in this case is sufficient. It is also claimed in argument that persons or corporations who are not parties to the suit, but who are parties to the ditch proceeding, were not properly notified, and that this is ground for injunction on the part of the plaintiffs. We think there is nothing in this contention. The statute provides that all suits must be brought in the name of the real party in interest, and the Supreme Court, in the case of *Howell Tp. (Bd. of Ed.) v. Guy*, 64 Ohio St. 434, 445 [60 N. E. Rep. 573], say:

"To warrant a recovery on the petition, it must show a cause of action in the plaintiff."

See also *Buckingham v. Buckingham*, 36 Ohio St. 68, 78.

It is claimed that the commissioners did not comply with the provisions of Rev. Stat. 4452 (Lan. 7635), as to a view of the line of the proposed improvement. We do not believe that this statute contemplates that the commissioners must actually set foot on every inch of the line of the ditch, but that they shall meet at the beginning of the improvement, hear such complaints as the persons affected may have to offer, and thereafter view the line of the ditch in such a manner as they may understand the situation and lay of the land along the same, so as to determine the necessity of the same, and so that they may be able to make an apportionment of the costs of the improvement. We think the testimony shows that the commissioners substantially complied with this provision of the statute.

It is claimed that there is no necessity for the improvement. This raises the question as to whether or not it conduces to the public health, convenience, or welfare, and must be decided by the commissioners in the first instance, and their decision in this behalf cannot be controlled by a court of equity. A party aggrieved on this question must pursue the remedy by appeal. See Rev. Stat. 4460 (Lan. 7643). Neither do we think that the decision of the commissioners as to the size of the ditch can be controlled by a court of equity, but if this were a question to be decided by the court we are not prepared to say that it has been shown by proof that the proposed improvement will be too large.

It is also claimed that the real object of the improvement is to furnish an outlet for the sewerage of the village of Hicksville. Without stopping to analyze the evidence, all we care to say on this subject

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is, that this allegation of the petition has not been established by the evidence. But the court is of the opinion that the language of the entry in this case should be so worded and guarded that this decision can never be used in the future to bar anyone along the line of the ditch from bringing an injunction suit to prevent the emptying of the sewerage of the village of Hicksville into this improvement. Nearly all the plaintiffs take the stand and testify that their lands will, in nowise, be benefited by the proposed improvement. But the evidence, taken as a whole, seems to contradict these broad statements and to show that there is a necessity for the improvement of these ditches, and that such improvement will be a benefit to the lands lying adjacent thereto.

There seems to be a misunderstanding of the jurisdiction of a court of equity to enjoin an assessment for a ditch improvement, where the only allegation in the petition is the bare statement that the improvement will not benefit the lands of the petitioners, and the proof to support such allegations is a statement that the claimants' lands will, in nowise, be benefited. There are at least four cases referred to in the Law Bulletin, affirmed by the Supreme Court, without report, where it is held that a petition containing only the statement in substance that the proposed improvement, when constructed, will not and cannot be of any benefit to the lands of the complainants, is not good as against demurrer. I refer to the cases of *McAdams v. Commissioners*, 22 Bull. 206, and the three cases referred to in *Moody v. George*, 1 O. S. C. D. 578 (37 Bull. 189, 191). In *Miller v. Logan Co. (Comrs.)* 2 Circ. Dec. 358 (3 R. 617), in the opinion on page 359, our own circuit court, in speaking of this question of benefit, say:

"Unless it is shown that there is some collusion, fraud, or positive wrong perpetrated, the action of the board of county commissioners in this particular will not be disturbed."

We believe that if the decisions are carefully read, they will show that in order to disturb the assessment, it must be shown that the commissioners committed some fraud or mistake. We are cited to the case of *Blue v. Wentz*, 54 Ohio St. 247 [43 N. E. Rep. 493]. There it was held that the petition made a good case, but it was upon the ground that the facts plead showed that the commissioners had made a mistake in making the assessment; that is, the facts showed that the commissioners had made the assessment on a mistaken or wrong basis. And in *Buckley v. Lorain Co. (Comrs.)* 1 Circ. Dec. 137 (1 R. 251), the relief was based on a mistake on the part of the commissioners, and this is always ground for relief in equity. Further, it is doubtful if Rev. Stat. 4491 (Lan. 7675) applies to this kind of a case at all, as it only provides for proceedings to locate and establish ditches, and if we are to adopt the reasoning of Judge Killits, in *Cooper v. Van Wert Co. (Comrs.) supra*, it certainly does not apply. There was no proof offered to support the allegation of misrepresentation or fraud on the part

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of the commissioners, as to the day set for filing and hearing claims for compensation and damage, and no proof of collusion between the commissioners and the officers of the village of Hicksville.

The claim that plaintiff's lands will be cut through and occupied, and damaged, affords no ground for injunction, as the plaintiffs have a right to appeal on this question.

Lastly, should an injunction be granted on the ground that the improvement will not afford a sufficient outlet? This question has given the court more trouble than any other in the case, but after going over the evidence on this subject thoroughly, we are not prepared to say, taking into account the nature of the improvement, and the nature of the creek at the terminus of the improvement proposed, that a sufficient outlet will not be afforded by this improvement. Neither are we clear that this question can be made in this case by the petitioners.

In the case of *McAdams v. Commissioners*, 22 Bull. 206, already referred to, it was held that this provision of the statute refers to the escape of the water at the mouth of the ditch. The plaintiffs seeking the injunction along the line of the ditch are above this point, and there is nothing in the evidence to show that they are, in any way, injured because of the size of the ditch at the outlet. We have shown that it is plain that the plaintiff must recover on his own case; that is, to warrant a recovery on the petition, a cause of action must be shown in the plaintiff. See *Hopewell Tp. (Bd. of Ed.) v. Guy*, and *Buckingham v. Buckingham*, *supra*. On this question we also offer the query as to whether or not this question should not have been reached by appeal, and whether or not it is not covered by that provision in the statute for appeal, wherein it is provided that an appeal may be had as to whether or not the route of the ditch is practicable?

For these reasons the temporary injunctions in these cases will be dissolved.

INJUNCTION—TRADE SECRETS.

[Huron Common Pleas, July 16, 1906.]

HOLLAND STOCK REMEDY CO. v. INDEPENDENT CHEM. CO. ET AL.

1. SECRET PROCESS OR FORMULA FOR COMPOUND IS A SPECIES OF PROPERTY—PUBLICATION BY ONE WHOSE KNOWLEDGE ARISES FROM BREACH OF FAITH BY EMPLOYE OF OWNER WILL BE ENJOINED.

A secret formula for the compounding of a stock remedy, whether it be patentable or not, and whether the product or package be protected by trade-mark or not, is a species of property in the enjoyment of which its owner will be protected. An injunction will lie to prevent those persons from disclosing this formula, or any formula represented to belong to plaintiff, whose knowledge of such formula has come directly from their own confidential employment in plaintiff's service or indirectly from those whose knowledge thereof is the result of such confidential employment.

[For other cases in point, see 7 Cyc. Dig., "Trade Secrets," §§ 6-9.—Ed.]

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2. MAXIM, "HE WHO SEEKS EQUITY MUST DO EQUITY," APPLICABLE ONLY WHERE MISCONDUCT RELATES TO SUBJECT-MATTER OF PLAINTIFF'S CLAIM.

The maxim that one must come into a court of equity with clean hands, or, "He who seeks equity must do equity," is not applicable to a case where the conduct complained of by the defendant does not relate to the subject-matter of plaintiff's action.

[For other applications of maxim, see 4 Cyc. Dig., "Equity," §§ 448-452.—Ed.]

3. INJUNCTION WILL NOT LIE TO RESTRAIN USE OF SECRET PROCESS WHERE USES ARE SO DISSIMILAR AS NOT TO DECEIVE ONE USING ORDINARY CARE.

An injunction will not lie to restrain a defendant from using a secret formula for a stock remedy belonging to plaintiff, or representing that he is using plaintiff's formula, where the evidence discloses that the appearance of the two compounds is similar but that the packages in which they are sold have no resemblance to each other, the ingredients are different and no purchaser using ordinary care has been or is likely to be deceived into purchasing the one for the other, and where defendant does not claim nor intend to use plaintiff's formula.

[For other cases in point, see 5 Cyc. Dig., "Injunction," §§ 318-321.—Ed.]
[Syllabus approved by the court.]

INJUNCTION.

R. L. Walden and G. R. Craig, for plaintiff.

McKnight & Thomas, for defendants.

RICHARDS, J.

This action is brought for the purpose of obtaining a perpetual injunction restraining the defendants from divulging and publishing a certain trade secret or formula for manufacturing "Dr. Holland's Medicated Stock Salt," or any formula represented to be such, and from using said formula in manufacturing the remedy sold by defendants, and for damages.

Upon filing the original petition, a temporary injunction was allowed, to prohibit the disclosure of the formula, and the case has now been heard by the court on its merits.

It appears from the pleadings and the evidence that about 1896 Dr. R. G. Holland discovered a formula for the preparation of a remedy which was put on the market in 1897 and has become generally known as "Dr. Holland's Medicated Stock Salt."

The preparation is shown to be extensively used as a remedy and preventive of diseases in domestic animals and to have acquired an established reputation among raisers of horses, cattle, sheep and hogs. The formula and the method of compounding the remedy were kept as a trade secret, and exclusively owned and controlled by Dr. Holland until the plaintiff company was incorporated in April, 1904, at which time said corporation succeeded to the business, including the formula and good will.

The plaintiff avers that the defendant, W. L. Minzey, while in plaintiff's employment as a salesman of "Dr. Holland's Medicated Stock Salt," surreptitiously ascertained certain of the principal ingredients

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composing the remedy, and that one Martin Van Duyke, while in plaintiff's employment and being intrusted in confidence with the secret formula and the method of combining the ingredients, communicated his knowledge to said defendant, Minzey, who had information that Van Duyke's knowledge had been acquired in confidence while an employe. Minzey is alleged to have taken part in the organization of several companies for the manufacture of a similar remedy based upon the information which he had acquired as an employe, and through Van Duyke.

The defendant, Minzey, assisted in the organization of the defendant, the Independent Chemical Company, in August, 1905, and he and the other individual defendants are officers in said company, Minzey having been general manager thereof for some months and being now the secretary and treasurer.

The Independent Chemical Company has, since its organization, been engaged in manufacturing and selling a remedy for stock which is somewhat similar to the remedy made by plaintiff, and is known as "Tonic Stock Salt." In color and appearance, the two remedies are strikingly similar, but they are put up and marketed in packages, and neither the defendant's packages nor the labels thereon bear any resemblance to the packages and labels used by the plaintiff. Salt is the chief base for the compound in each remedy, and the defendant company uses the same material for giving the characteristic black color (or, perhaps, more properly speaking, absence of color), that is used by the plaintiff. In addition to the salt and the ingredient which gives the color, the two companies use one drug which is the same, and here the similarity in the remedies ends. The plaintiff uses another ingredient which the defendant does not use, while the defendant uses three or four ingredients not used by the plaintiff.

It appears from the evidence that the physiological effects of the two remedies are not precisely the same.

The parties are rivals in business, and the plaintiff contends that the preparation made by the defendants is in imitation of its remedy and that it is calculated to deceive and does deceive purchasers into the belief that they are buying "Dr. Holland's Medicated Stock Salt." On the other hand, the defendants contend that their remedy is wholly different from plaintiff's, and not an imitation and not calculated to deceive, and that plaintiff has no secret formula for the reason, as they claim, that, for many years prior to Dr. Holland's discovery, farmers and stock raisers have used a similar remedy compounded by themselves and known to many people.

On February 6, 1905, the defendant, Minzey, wrote to the plaintiff a letter soliciting re-employment, in the course of which he used this language:

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"You will be surprised to hear from me again, no doubt, out to come to the point, I would like very much to go to work for you again. I have got sick and tired of working an inferior and imitation article, and would like to go back to the genuine."

In September, 1905, the plaintiff caused this portion of Minzey's letter to be printed and circulated in the community where defendants were engaged in business, omitting the date of the letter. The public might believe from this circumstance that Minzey referred to the Tonic Stock Salt manufactured by the Independent Chemical Company, whereas the letter had been written before that company was organized. This publication was followed by a letter from the Independent Chemical Company to the plaintiff, dated September 22, 1905, in which the following language is used:

"We made no idle statement when we spoke of publishing your formula, and *you* know that we have it, and where we got it."

Four days later, this action for an injunction and damages was brought.

The defendants by way of cross petition claim damages of the plaintiff for the publication of the excerpt and other statements, and they also ask an injunction against the continuance of the publication. It may be said in passing, that so far as the question of damages is concerned, neither party has made any showing, and that matter may be dismissed from further consideration.

So far as the claims made by the plaintiff are concerned, this case naturally divides itself into two branches:

First, as to the right of the plaintiff to an injunction against publishing its trade secret or formula, or any formula represented to be plaintiff's.

Second, as to the right of the plaintiff to an injunction against the defendants to prevent their using or representing that they are using plaintiff's formula. These questions will be considered in their order.

A formula for compounding a remedy may well be a species of property. As a matter of fact, it often is property of great value. Whether it is patentable or not, is not material. Neither is it material whether the product or package is protected by a trade-mark. It is sufficient if the formula is kept secret. No reason is perceived why equity should not protect the owner of a trade secret in the possession and enjoyment of his property, the same as the owner of any other property will be protected, when a proper occasion arises.

Beyond any question the defendants possess information as to what are the material ingredients in the remedy manufactured by the plaintiff. This information was acquired by the defendant, Minzey, either while in the employment of the plaintiff, or from Van Duyke who got his information while so employed. Whatever information Minzey re-

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ceived from Van Duyke, he received with knowledge that Van Duyke was violating a trust which he owed to the plaintiff. Van Duyke had executed his individual bond to Dr. Holland upon entering his employment, conditioned to keep forever secret the ingredients and composition of the remedy owned by the plaintiff. Van Duyke is insolvent. Even if he had not executed the bond, the law would imply a contract not to disclose a trade secret communicated to him in confidence by his employer while that fiduciary relation existed. It is, therefore, of no consequence whether Minzey acquired his information of the material parts of the remedy, directly from his own employment, or through a breach of the confidence reposed in Van Duyke. The case is directly within the principle announced in *Stone v. Goss*, 55 Atl. Rep. 736 [65 N. J. Eq. 756; 63 L. R. A. 344; 103 Am. St. Rep. 794]. In that case it was held that a manufacturer whose goods were made by an unpatented secret process had the right to an injunction to prevent the disclosure of his secret, the court saying that such right was established by a well-considered line of cases. The court is very explicit in its language, saying:

"One who is under an express contract, or a contract implied from a confidential relation, not to disclose a trade secret, will be enjoined from disclosing the same.

"Others who induce him to disclose the secret, knowing of his contract not to disclose it, or knowing that his disclosure is in violation of the confidence reposed in him, will be enjoined from making any use of the information so obtained, although they might have reached the same result independently by their own experiments or efforts."

Another New Jersey case laying down the same doctrine is *Salomon v. Hertz*, 40 N. J. Eq. 400 [2 Atl. Rep. 379].

Some other leading American cases on this proposition, all recognizing the property and the power of equity to protect it, are the following: *Peabody v. Norfolk*, 98 Mass. 452 [96 Am. Dec. 664]; *Tabor v. Hoffman*, 118 N. Y. 30 [23 N. E. Rep. 12; 16 Am. St. Rep. 740]; *Tode v. Gross*, 127 N. Y. 480 [28 N. E. Rep. 469; 13 L. R. A. 652; 24 Am. St. Rep. 475]; *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110, 116; *Fralich v. Despar*, 165 Pa. St. 24 [30 Atl. Rep. 521]; *Little v. Gallus*, 38 N. Y. Supp. 1014.

An instructive case in the English courts is *Morison v. Moat*, 9 Hare 241, decided in 1851, and affirmed 21 L. J. Ch. 248. The injunction sought in that case was to prevent communicating or using the secret of compounding the remedy known as "Morison's Universal Medicine." In the course of the decision, the vice chancellor says:

"That the court has exercised jurisdiction in cases of this nature, does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction * * *

but

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upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

On page 263 the court says further:

"The defendant admits that the secret was communicated to him by Thomas Moat. The question then is, whether there was an equity against him; and I am of opinion that there was. It was clearly a breach of faith and of contract on the part of Thomas Moat to communicate the secret. The defendant derives under that breach of faith and of contract, and I think he can gain no title by it."

See also, *Green v. Folgham*, 1 Sim. & Stu. 398, decided by the high court of chancery in 1823.

So far as the investigations of counsel or the court have gone, there is no reported case in Ohio on this question until the year 1887. The superior court of Cincinnati in *Cincinnati Bell Foundry Co. v. Dodds*, 10 Dec. Re. 154 (19 Bull. 84), sustained the right of the assignee of an unpatented secret process for manufacturing bells to protection in a court of equity. The decision of the court as announced by Judge Taft is a careful and comprehensive review of the law on the subject. Two other cases in Ohio contain very satisfactory conclusions on the principle under consideration. See *National Tube Co. v. Tube Co.* 13-23 O. C. C. 468, affirmed without report in *National Tube Co. v. Tube Co.* 69 Ohio St. 560 [70 N. E. Rep. 1127]; and *Seifried v. Maycox*, 14 Dec. 536.

The contention by the defendant, that the use of similar remedies by stock raisers and farmers, before the discovery by Dr. Holland, deprives the plaintiff of the right to relief, cannot be sustained. The evidence shows that those combinations were not the same as plaintiff's, nor were they substantially similar. Each one of them omitted at least one of the ingredients used by plaintiff, and some of them added ingredients not used by it. None of them used the same proportions as plaintiff, nor its method of compounding.

But it is also urged that the plaintiff does not come into court with clean hands, and is not therefore entitled to relief in a court of equity. The defendants aver that they would not disclose nor offer to disclose the formula owned by the plaintiff, if the plaintiff had not first made an unfair, unjust and malicious attack on them. If the plaintiff did that, the law affords an adequate remedy to the defendants. They would not, by such an act, be justified in taking the law into their own hands and by publishing the plaintiff's trade secret, its formula, deprive it of property without process of law, or an opportunity to be heard. The maxim referred to has well-recognized limitations. It only deprives a plaintiff of relief where the misconduct complained of by the defendant relates to the subject-matter of the plaintiff's action. *Kinner v. Railway*, 69 Ohio St. 339 [69 N. E. Rep. 614]; *Buckland v. Rice*, 40

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Ohio St. 526, 528; *Trice v. Comstock*, 121 Fed. Rep. 620 [57 C. C. A. 646; 61 L. R. A. 176]; 1 Pomeroy, Eq. Jurisp. Sec. 399.

The conduct complained of by the defendants does not relate to the subject-matter of this action, and does not, therefore, deprive the plaintiff of the right to relief. Besides, it appears from the evidence that Minzey before the distribution of the circulars by plaintiff had offered to disclose to customers the formula owned by the plaintiff.

I conclude for the reasons given that the plaintiff is entitled to an injunction against the disclosing of its formula, or any formula represented to be plaintiff's.

Second, does the plaintiff have the right to an injunction restraining the defendants from using or representing that they are using the plaintiff's formula?

An answer to this question involves a consideration of the law of unfair competition, as it is called. A large number of decisions, many of them in the federal courts, exist upon this branch of the law. A careful consideration of the cases leads to the conclusion, that nothing less than conduct which tends to pass off one man's merchandise or business as that of another, will be sufficient to constitute unfair competition. An exact copy of another's packages, or labels, or name, or trade-mark, is not necessary. It is clear that similarity, not identity, is the test. If the similarity is so close that unwary purchasers will be deceived; if ordinary purchasers, buying with ordinary care, are likely to be misled, then it is unfair competition, otherwise not. *Heide v. Wallace & Co.* 129 Fed. Rep. 649; *Continental Tobacco Co. v. Larus & Bro. Co.* 133 Fed. Rep. 727; *Marvel Co. v. Pearl*, 133 Fed. Rep. 160; *Enterprise Mfg. Co. v. Landers*, 124 Fed. Rep. 923; affirmed in *Enterprise Mfg. Co. v. Lander*, 131 Fed. Rep. 240 [65 C. C. A. 587]; *Cole Co. v. Cement & Oil Co.* 130 Fed. Rep. 703 [65 C. C. A. 105]; *Byam v. Eddy*, 2 Blatchf. 521 [4 Fed. Cas. 935]; *Cincinnati Vici Shoe Co. v. Shoe Co.* 9 Ohio Dec. 579 (7 N. P. 135).

In the language of the master of the rolls, in *Craft v. Day*, 7 Beav. 84, "there must be such a general resemblance of the forms, words, symbols and accompaniments as to mislead the public," before the manufacture and sale of the goods by a business rival can be enjoined.

These cases are sufficient to enunciate the principles under consideration. Applying them to the facts, it is clear that the plaintiff is not entitled to an injunction to prevent the defendants from using, or representing that they are using, plaintiff's formula. It must be remembered that there is no evidence of any purchaser being deceived by the similarity of the goods. The resemblance, at least as long as the goods are marketed in packages, and labeled as they now are labeled, is not calculated to deceive anyone. As for the preparation itself, the evidence shows a substantial difference in the name, in the physiological

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effects, and in the ingredients, and it does not appear that the defendants have ever claimed to use plaintiff's formula, nor that they intend to do so.

The cross petition of the defendants asks for an injunction to prevent the plaintiff from making misleading representations to prospective purchasers of defendant's goods, and particularly to prevent the further circulation of the paragraph from the Minzey letter. It is sufficient to say that no such showing is made as would entitle the defendants to relief by way of injunction.

For the reasons given, an injunction will be granted to the plaintiff to the extent indicated; the cross petition of the defendants will be dismissed. The costs will be divided—one-third adjudged against the plaintiff and two-thirds against the defendants.

BONDS—MUNICIPAL CORPORATIONS.

[Mercer Common Pleas, September 14, 1906.]

J. F. SMITH, A TAXPAYER, v. ROCKFORD (VIL.) ET AL.

"INTERSECTION BONDS" HELD SUBJECT TO PROVISIONS OF LONGWORTH ACT.

Bonds issued by a municipality, sometimes called "intersection bonds," to pay the corporation's share of sewer and street improvements, and to be paid for by general taxation upon all the taxable property within the municipality, come within the limitations and restrictions of the Longworth bond act, 95 O. L. 313, as amended and supplemented by acts 96 O. L. 40, Sec. 53, 97 O. L. 291, 520, 98 O. L. 63 (R. S. 1536-292, 2835, 2835b; Lan 4017, 4294, 4295), and hence the total aggregate issue of such bonds and other bonds coming under the Longworth act must not exceed the 1 per cent limit in any one fiscal year, without submitting the question of such issue to the vote of the people.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," § 2990.—Ed.]

MOTION to dissolve temporary injunction.

Layton & Son and J. W. Loree, for plaintiff.

J. D. Johnson and E. E. Jackson, for defendants.

CUNNINGHAM, J.

It is unnecessary for the court to enter into a discussion of the case tendered by the petition in its entirety, but I will content myself by stating enough of the issue to apply conclusions to which I have come.

The village of Rockford, Mercer county, Ohio, has an entire tax duplicate of about \$360,000; 1 per cent of which would be \$3,600. The town council of that village has determined to improve two certain streets therein and build certain sanitary sewers; the streets to be paid for by assessment upon the abutting property and by the village, under Sec. 53 of the municipal code (Rev. Stat. 1536-213; Lan. 3604), and the

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sewers by assessment upon the property benefited and by the village likewise.

It will be necessary for the village, in order to pay for its share of these improvements, to issue its bonds for substantially the sum of \$17,000, which it is proceeding to do; and has sold, but not yet delivered, said bonds.

The question as to whether or not said improvement should be made or said bonded indebtedness created, was not submitted, under the statute, to the voters of said municipality. The plaintiff claims that it is beyond the power of said village to create said bonded indebtedness, without submitting the same to a vote, because such act will be in violation of Rev. Stat. 2835 (Lan. 4294), which is now substantially Sec. 100 of the municipal code. The defendant claims that the council has within its power, and depended for that power upon a provision of Sec. 53 of the municipal code, which directly provides that the council has the power to make the improvements herein contemplated and shall have the power to issue its bonds to raise the money to pay for the city's share of said improvements and to build the intersections.

These two sections appear directly to conflict—Rev. Stat. 2835 (Lan. 4294), interfering, under the state of facts before us, with the carrying out of the provisions of 96 O. L. 40, Sec. 53. The plaintiff says that the two sections must be construed together and that, so taken, mean that the city can issue its bonds, as provided by 96 O. L. 40, Sec. 53, when such act does not violate the provisions of Rev. Stat. 2835 (Lan. 4294). The defendants urge that Sec. 53 operates as an exception to the rule laid down in Rev. Stat. 2835 (Lan. 4294); or, rather, that the indebtedness described by 96 O. L. 40, Sec. 53, is not contemplated by Rev. Stat. 2835 (Lan. 4294), and is not of the class governed by said last-mentioned act. As the court determines which of these contentions is right, so must his conclusion follow as to what his order should be in this case.

The question here involved is of exceeding importance. The court feels very much embarrassed in passing upon the question raised for the reason that another judge of this subdivision has passed upon the question substantially, as has at least one other and able judge of common pleas in the state. This case was argued very fully. Counsel on both sides seem to have been impressed with the importance of the question raised, and I have, to the best of my ability, carefully examined the briefs filed and carefully weighed the argument and confess to a very great uncertainty as to what the legislative intent in this case was.

A court should not interfere with the efforts of a municipality to improve, thus interfering with the right of a municipality to govern itself, unless some one's right is being interfered with and the intent and meaning of the law not being carried out. I cannot agree with the

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reasoning of Judge Bigger, whose decision upon this question has been submitted to and which decision is carefully and well considered, for the reason that he seems to base his conclusion flatly upon one proposition, and that is, what he terms "intersection bonds" do not come under the class of bonds described in Rev. Stat. 2835 (Lan. 4294). He does not explain, in his decision, why they do not. That act Rev. Stat. 2835 (Lan. 4294), in describing the bonds to which it refers, uses the definition, bonds "For resurfacing, repairing, or improving any existing street or streets as well as other public highways," and that is exactly the kind of bonds involved in this action. Intersection bonds, as that court calls them, are bonds issued for the purpose of raising money to build intersections of streets as a part of an improvement upon those streets; and, further than that, raise the money to pay the city's share of not less than one-fiftieth of the entire cost of the improvement outside of the intersections.

I therefore believe that that kind of a bond is controlled by Rev. Stat. 2835 (Lan. 4294). I therefore believe these two sections of the statute only apparently are in direct conflict. I believe Rev. Stat. 2835 (Lan. 4294) to be a general statute by which the legislature intended to control the action of town councils in their expenditures, and that all their expenditures, for the purposes named in that statute, are controlled in that act, unless explicitly excepted by the special act providing for them.

I confess that the application of that act tends to delay corporations in carrying out the improvement of its streets. My first impression was, that had the legislature intended the bonds otherwise in 96 O. L. 40, Sec. 53, to be governed by the provisions of Rev. Stat. 2835 (Lan. 4294), it would have taken the pains to provide directly for the issuance of bonds, as it does in 96 O. L. 40, Sec. 53, and I was inclined to think that the proper method of construing these statutes was to hold that 96 O. L. 40, Sec. 53, having been passed after Rev. Stat. 2835 (Lan. 4294), although the latter was re-enacted at the same time as the former when they were both carried into the municipal code, so-called, could be treated, under a familiar rule, as having been intended by the legislature as an exception. But in examining the act, 97 O. L. 516, 520, and applying there that same rule, I find that Rev. Stat. 2835 (Lan. 4294), has been, since the passage of these two acts as above referred to, supplemented as Rev. Stat. 2835b (Lan. 4295); and I believe that I am relieved from the further examination into the construction that ought to be given these two laws by that supplement. I believe that in that supplement the legislature has itself construed these sections. It reads as follows:

"Provided, further, that the limitations of one per cent and four per cent prescribed in Rev. Stat. 2835 (Lan. 4294), shall not be con-

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strued as affecting bonds issued under authority of Sec. 2835 upon the approval of the electors of the corporation; nor shall bonds which are to be paid for by assessments specially levied upon abutting property, be deemed as subject to the provisions of said section."

As is shown by that supplement the legislature had under consideration at the time of its passage, the bonds authorized by 96 O. L. 40, Sec. 53 and they undertook to say what bonds described in 96 O. L. 40, Sec. 53, shall not be subject to the provisions of Rev. Stat. 2835 (Lan. 4294), and do not include in said list bonds that are to be paid by general taxation. The bonds under discussion in this case are not to be paid by assessments specially levied upon abutting property and, therefore, do not come within the provisions of this supplement.

I cannot read this amendment, or, rather, supplement, in any other way than that it is an act by which the legislature undertook to say just what part of the bonds contemplated by 96 O. L. 40, Sec. 53, should be relieved from the operation of Rev. Stat. 2835 (Lan. 4294), and that it did not include bonds of the character that are here in controversy.

It, therefore, follows that the plaintiff is entitled to at least some of the relief prayed for in his petition and that the temporary injunction heretofore granted should be continued in force, enjoining the defendant, the village of Rockford, its council and officers, from executing and delivering the bonds described in the petition or from borrowing money to build the improvements described in the petition, until a fund for the payment thereof is provided according to law; and that the contractors be enjoined, as prayed for in the petition, from carrying out their contracts until a fund is provided according to law to pay them; which, of course, can be done if the voters of said municipality, under statute, authorize it.

The court feels that all of the parties in this case ought to be protected and the continuance of the temporary injunction in force is conditioned that the plaintiff shall furnish an undertaking, for the benefit of all the defendants, in the sum of \$7,000, to the satisfaction of the clerk.

Superior Court of Cincinnati.

DEEDS—MORTGAGES.

[Superior Court of Cincinnati, General Term, March, 1906.]

Ferris, Hoffheimer and Littleford, JJ.

(Judge Littleford of Hamilton common pleas, sitting in place of Judge Hosea.)

*JOHN H. GIBSON, TREAS. V. MARY STEELE KRAAY ET AL.

TRANSFER BY DEED WITH GRANT BACK OF PERPETUAL LEASE DOES NOT AMOUNT TO A MORTGAGE SO AS TO AUTHORIZE TAXING PURCHASE PRICE AS MONEY LOANED ON MORTGAGE SECURITY.

A transaction whereby land is deeded to one in return for the payment of a sum of money, and the grantee at once leases the property by perpetual lease back to the grantor for a rent equal to the legal rate of interest on the money paid, with the privilege of repurchase at the same price after ten years, is to be regarded as a conditional sale and not a mortgage loan, and the grantee may enjoin the collection of taxes upon the money paid by him as upon a mortgage loan.

[For other cases in point, see 6 Cyc. Dig., "Mortgages," §§ 392-394; 7 Cyc. Dig., "Taxation," § 104.—Ed.]

[Syllabus by the court.]

ERROR to special term.

A. B. Benedict, for plaintiff in error.

C. B. Wilby, for defendants in error.

FERRIS, J.

The action below sought an injunction to restrain the taxing officials of Hamilton county from collecting certain taxes theretofore levied upon investments popularly known as ground rents. The pleadings and issues made necessitated the determination by the court, of the question whether such transactions were conditional sales of realty or loans on mortgage security. If the former, confessedly there was nothing subject to taxation; if of the latter class, there was. The action of the officials was predicated on Rev. Stat. 2734 (Lan. 4074), which provides that "all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely," shall be listed for taxation. The court below found that the transaction was not a loan, but an investment of a trust fund in property, the title to which was conveyed to the trustee, and that simultaneously therewith a perpetual lease of the property was made to the grantor with the privilege of purchasing after a term of years, at the same sum named as the consideration in the deed. The court found as a proposition of law, that such transaction was a conditional sale, and not in law to be regarded as a mortgage loan, and enjoined the county officials from listing the same for taxation.

*Dismissed by Supreme Court for failure to file printed record, *Lewis v. Kraay*, 51 Bull. 362.

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For the reasons stated in the opinion, we are in accord with the conclusions of fact shown by the testimony and reached by the trial judge, and we are in full accord also with the propositions of law relating to such facts as announced in his opinion, found in *Kraay v. Gibson*, 15 Dec. 323.

Hoffheimer, J., concurs.

LITTLEFORD, J.

The petition in this case prays for an injunction to restrain the county officials from attempting to collect taxes levied upon certain investments, which the petition calls ground rents, and which the answer says were loans.

The pleadings raise the question whether certain transactions were conditional sales of realty or loans on mortgage security. If they were sales, there was nothing to tax; if they were loans, then there was.

Revised Statutes 2734 (Lan. 4074) provides that all money, loaned must be listed for taxation, the exact words being:

"All money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely."

Holland deeded realty to White and received cash for it; and at the same time White made a perpetual lease to Holland of the property with a privilege of purchase at any time after ten years for the same sum paid by White. The rent was just equal to 6 per cent of the purchase money.

The other cases involved present a similar state of facts, White making a similar arrangement with Miller, Chatfield and others.

The deed to White and the lease back make on their face a conditional sale and not a mortgage, because under the arrangement White did not have the remedy to which a mortgagee is entitled. That is, if the vendor chose to continue as a lessee forever, White could never enforce the repayment of the money, and if he defaulted White could not hold him for any deficiency after taking the property.

In *Goodman v. Grierson*, 2 Ball & B. 274, in which the question was whether the transaction was a mortgage or conditional sale, the Lord Chancellor says:

"The question is, Was this conveyance intended to be a mortgage or sale of these lands?"

He then gives the rule by which this question may be determined, and says:

"The fair criterion by which the court is to decide whether this deed be a mortgage or not, I apprehend to be this, Are the remedies

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mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?"

In *Conway v. Alexander*, 11 U. S. (7 Cranch) 218 [3 L. Ed. 321], Chief Justice Marshall says:

"The inquiry must be, whether the contract in the specific case is a security for the repayment of money or an actual sale. If a security in the nature of a mortgage is intended, it is necessary that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case; but the remedy must exist in order to justify a construction which overrules the express words of the instrument."

In *Slutz v. Desenberg*, 28 Ohio St. 371, Ashburn, J., deciding the case, quotes from these two authorities and says of the rule laid down by Chief Justice Marshall:

"This American rule is in harmony with the rule in England, as announced in *Goodman v. Grierson*, *supra*, and will be found to be the rule as recognized in most of the states."

The learned judge then proceeds to quote from *Robinson v. Cropsey*, 2 Edw. Ch. 138, 144, a case frequently referred to in books, as follows:

"Where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of a loan so as to constitute a debt or liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, then it must be deemed purchase money, and the transaction will be a sale upon condition, which the grantor will defeat only by a repurchase or the performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property."

Based upon these authorities, our Supreme Court in *Slutz v. Desenberg*, *supra*, has held the following to be the law in this state:

"To determine whether a deed, absolute in form, is in equity a mortgage, requires that the real intention of the parties to the transaction be ascertained. A fair criterion seems to be this: If, under all the facts and circumstances, the relation of lender and borrower, or creditor and debtor, do not subsist, and the grantor is under no personal obligation that can be enforced by the grantee as creditor or mortgagee, the transaction will be treated as a sale and not as a mortgage."

The foregoing authorities make it clear that these transactions before us were on the face of the documents conditional sales and not mortgages.

Coming now to the evidence offered to show that these were mortgages instead of conditional sales, and keeping in view that such evi-

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dence must be clear, satisfactory and convincing, we are of opinion that the evidence here is not of a kind to justify a chancellor in finding that these transactions were intended to be mortgages.

As has been pointed out, the terms of the documents in these cases make them clearly conditional sales. The parties to the documents were all careful men of business, advised no doubt by competent lawyers, and the exact import of the documents was of course known to them all. It is probable that these men meant just what they said in these papers. Most of the parties to these transactions have so testified. It is hard to believe that contracts in writing between such men were accompanied by deceitful side agreements, and that now they are attempting to cover up their deceit by swearing falsely. It is much easier to believe that words used by some of them with reference to the matter, such, for instance, as some of the answers made on cross-examination before the auditor (which, in truth, furnish very good ground for the claim that both parties regarded the transactions as mortgages), were, after all, the inaccurate use of terms by laymen with reference to legal arrangements made some years before. At most these expressions are only admissions, and we are warned by the authorities that admissions are a sort of evidence not much to be relied on.

It might be well here to consider what motive the grantors could have for a side agreement that these arrangements were to be in fact mortgages. The conditional sale with a perpetual privilege of purchase was just as good as a mortgage so far as the grantors were concerned, if not better, there being no risk of foreclosure. Of course, unless the grantors went into a side agreement, there was none, for White could not agree by himself. It does not seem that there was any sufficient motive to induce the grantors to help along a fraud. As for White, if he really wanted a mortgagee's rights he would hardly have relied upon a side agreement to secure those rights. It would be practically impossible for him to prove such an agreement if disputed by the other party to the transaction, and no court of equity would permit him to try to do so, since such an arrangement would be a fraud designed for the purpose of avoiding the payment of taxes on a mortgagee's loan.

Taken all in all, it seems that White was willing to give up the rights of a mortgagee, and adopt the plan of conditional sale, so as to avoid paying taxes on mortgages. That is what he says his purpose was. He had the legal right to make the arrangement he did, giving up one advantage to gain another. The grantors were probably willing to accept the plan of a conditional sale instead of a mortgage, so long as they got the money. It is quite easy to understand how both sides came to agree upon a conditional sale, and that there was no intention whatever that the transaction was to be in reality a mortgage.

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The court below (*Kraay v. Gibson*, 15 Dec. 323) found that the evidence was not clear, satisfying and convincing, tending to show the intention of the parties to have been, that the transaction was a mortgage, and there seems to be no reason to disturb the finding.

As to White's right to enjoin the county officers from taxing the money paid by him for the property, this cannot be denied to him. *Hagerty v. Huddleston*, 60 Ohio St. 149, 165, 167 [53 N. E. Rep. 960]; *Musser v. Adair*, 55 Ohio St. 466 [45 N. E. Rep. 903].

The judgment is affirmed.

RESTRAINT OF TRADE—INTOXICATING LIQUORS.

[Superior Court of Cincinnati, General Term, February, 1906.]

Ferris, Hoffheimer and Caldwell, JJ.

(Judge Caldwell of the Hamilton common pleas sitting in place of Judge Hosea.)

ALICE G. CARR v. J. WALKER BREW. CO.

LAW AS TO RESTRAINT OF TRADE APPLY TO LIQUOR TRAFFIC.

Under the laws of this state relative to contracts in restraint of trade, no exception is made as to the traffic in intoxicating liquors; a contract, therefore, not to enter the saloon business in a certain locality, the only purpose of which is to place restraint upon trade, is as unenforceable as though made with reference to any other line of business.

[For other case in point, see 2 Cyc. Dig., "Contracts," §§ 651-685.—Ed.]

ERROR to special term.

Harmon, Colston, Goldsmith & Hoadly and Oscar Stoebr, for plaintiff in error.

It is the *prima facie* presumption of law that the contract is illegal and void, and the burden is upon the party seeking to enforce it to show that it is the one exception to the rule, that all contracts in restraint of trade are illegal and void. *Lange v. Werk*, 2 Ohio St. 519; *Thomas v. Miles*, 3 Ohio St. 274; *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *Chappel v. Brockway*, 21 Wend. 157; *Ross v. Sadgbeer*, 21 Wend. 166; *Pierce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102]; *State v. Gage*, 72 Ohio St. 210 [73 N. E. Rep. 1078].

In order to bring the contract within the exception to the rule, that all contracts in restraint of trade are void, the plaintiff must show that: (1) The restraint is partial. (2) Upon an adequate consideration. (3) It is reasonable and not oppressive. *Mitchell v. Reynolds*, 1 P. Wms. 181, 1 Smith's Lead. Cas. *510; *Lange v. Werk*, 2 Ohio St. 519; *Thomas v. Miles*, 3 Ohio St. 274; *Chappel v. Brockway*, 21 Wend. 157; *Ross v. Sadgbeer*, 21 Wend. 166; *Gilman v. Dwight*, 13 Gray 356 [74 Am. Dec. 634].

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A mere money consideration is not sufficient to render the contract valid. *Lange v. Werk*, 2 Ohio St. 519; *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *Ross v. Sadgbeer*, 21 Wend. 166; *Chappel v. Brockway*, 21 Wend. 157; 24 Am. & Eng. Enc. of Law (2 ed.) 581 (e) also 853 (c); *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. (20 Wall.) 64 [22 L. Ed. 315]; *State v. Gage*, 72 Ohio St. 210 [73 N. E. Rep. 1078].

The partial restraint must not be the primary object. *Grasselli v. Lowden*, 11 Ohio St. 349; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 602 [49 N. E. Rep. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736]; *Paragon Oil Co. v. Hall*, 4 Circ. Dec. 576 (7 R. 240); *More v. Bennett*, 140 Ill. 69 [29 N. E. Rep. 888; 15 L. R. A. 361; 33 Am. St. Rep. 216]; *State v. Line Co.* 61 Ohio St. 520 [56 N. E. Rep. 464]; *United States v. Pipe & Steel Co.* 85 Fed. Rep. 271 [29 C. C. A. 141; 54 U. S. App. 723; 46 L. R. A. 122].

The good will is inseparable from the business or property. *Morgan v. Perhamus*, 36 Ohio St. 517 [38 Am. Rep. 607]; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Burkhardt v. Burkhardt*, 5 Dec. Re. 185 (3 Am. L. Rec. 418); *Jung v. Weyand*, 9 Dec. Re. 485 (14 Bull. 143); *Lindley, Partnership* *859; 14 Am. & Eng. Enc. Law (2 ed.) 1086.

A contract having for its main purpose the restraint of trade is absolutely void. *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *Morris Run Coal Co. v. Coal Co.* 68 Pa. 173 [8 Am. Rep. 159]; *Arnot v. Coal Co.* 68 N. Y. 558 [23 Am. Rep. 190]; *Graf v. Horseshoers Prot. Assn.* 15 Dec. 18; *State v. Pipe Linc Co.* 61 Ohio St. 520 [56 N. E. Rep. 464]; *United States v. Pipe & Steel Co.* 85 Fed. Rep. 271 [29 C. C. A. 141; 54 U. S. App. 723; 46 L. R. A. 122].

In argument the following cases were also cited. *Lawrence v. Kidder*, 10 Barb. 641; *Smith v. Hancock*, L. R. 1894, 2 Ch. 384; *Harkinson's Appeal*, 78 Pa. St. 196 [21 Am. Rep. 9]; *Allen v. Taylor*, 24 L. T. (N. S.) 249; *Tabor v. Blake*, 61 N. H. 83; *Eastern Express Co. v. Meserve*, 60 N. H. 198; *Josselyn v. Parson*, L. R. 7 Exch. 127; *Grimm v. Warner*, 45 Iowa 106; *Clark v. Watkins*, 9 Jurist (N. S.) 142; *Meyers v. Merillion*, 118 Cal. 352 [50 Pac. Rep. 662].

Coppock & Coppock, for defendant in error.

FERRIS, J.

The testimony produced in the court below established the fact that Alice G. Carr for several years prior to September 15, 1904, conducted a saloon and grocery business in a building at No. 728 West Front street, in this city. That Thomas Gilmore, the defendant and cross petitioner in error, was her brother, and in connection therewith was one George Ryan. A portion of the beer sold by her in a business conducted at said place was purchased from the J. Walker Brewing Company. Being de-

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sirous of disposing of her business, Alice G. Carr signed a certain paper writing, of which the following is a copy:

"Cincinnati, O., Sept. 15, 1904.

"This is to certify that we, Alice G. Carr and Thomas Gilmore, being the owners of all chattel and personal property, stock, fixtures, furniture, beer and all other property situated in the building known as No. 728 West Front street, have sold and do hereby, in consideration of the sum of six hundred dollars (\$600), sell, transfer and assign absolutely to said John D. Hall, all of said property above referred to, being all and singular every item of chattel and personal property contained in and about said premises of every description, whether in the saloon as well as in and about the kitchen, sitting room, or wherever same may be situated in and about said premises as fully as though same was particularly enumerated and described, and also including the good will of the business carried on by us at said place. And we also agree that we will not again enter into the grocery or saloon business within three blocks or squares, east, west, north or south of said premises, within eighteen months from date hereof.

"In witness whereof we have hereunto signed our names this fifteenth day of September, 1904.

"ALICE G. CARR,

"THOMAS GILMORE.

"Witnesses:

"ED. DOWLING,

"ANDY HORNICKEL."

The testimony shows that witness, Dowling, came to her and presented this paper to Alice G. Carr for her signature, and without reading or having same read to her, she signed it; and the testimony discloses that Dowling thereupon requested her to have her brother, Thomas Gilmore, sign the contract as a witness.

The testimony indicates that the statements made to Gilmore inducing him to sign the paper were not founded upon fact. On the day following, to wit, the sixteenth day of September, Mrs. Carr called upon Dowling at the office of the defendant in error (the J. Walker Brewing Co.) and received \$600. No part of the consideration was ever paid to Gilmore.

Subsequently, in December, 1904, one George Ryan, a half-brother of Mrs. Carr, and Thomas Gilmore began a saloon business at No. 710 West Front street, within the block containing No. 728 West Front street, and Mrs. Carr performed services for him as cook, and Gilmore as barkeeper. The contention of the J. Walker Brewing Company was, that Ryan was not the *bona fide* owner of the saloon, that same was the property of Mrs. Carr and Gilmore, and that Ryan's name was used as

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a disguise, and that the carrying on of the business was therefore in violation of the contract of sale by which Carr and Gilmore did covenant not to enter into business within three squares of the premises known as No. 728 West Front street for a period of eighteen months from September 15, 1904. Injunction was sought and obtained against Carr and Gilmore from carrying on or engaging in the saloon business either as principal or employe, within the time mentioned in the contract.

It is important to notice that Mrs. Carr, in answer, states that she has not engaged in the saloon business directly or indirectly, and denies all of the allegations of the petition; and Gilmore, in answer, states that he is simply an employe of Ryan, but further pleads that he neither entered into nor executed the contract, that he simply signed same as a witness, never having had any interest whatever in the chattels or business of the saloon at No. 728 West Front street, and that he received no part of the consideration paid by the brewing company to Carr.

Ryan, answering, says that he was the owner of the business, and that he had entered into no arrangement whatever with either Carr or Gilmore, except to secure their services as employes.

The position of the J. Walker Brewing Company is made plain by the allegations of their amended petition, in which it is made to appear that they were the real owners of the place of business at No. 728 West Front street and had leased same to a tenant from month to month upon condition that they should have the exclusive right to furnish all beer sold by the tenant, and that they were at the time of the filing of the petition, engaged in continuing said saloon business on said premises by and through their tenant.

It is therefore apparent that the action prosecuted below by the J. Walker Brewing Company was to prevent the defendants from carrying on a grocery and saloon business within three blocks or squares of the premises known as No. 728 West Front street, during the eighteen months from September 15, 1904.

Thomas Gilmore files his cross petition complaining that the judgment below enjoining him from carrying on or engaging in business was not sustained by sufficient evidence, was contrary to law, and said judgment should have been in his favor instead of defendant in error (the J. Walker Brewing Company).

For the purpose of determining what in our judgment is a pivotal point in this case we shall consider the following, to wit: Whether the covenant contained in the article of September 15, 1904, was in restraint of trade under the Ohio rule; and if, reaching an affirmative conclusion, it was illegal and invalid at the time and could not form a basis of any substantial right enforceable in a court of equity.

A mere reading of this contract furnishes *prima facie* the pre-
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sumption of law that the contract is illegal and void. A party seeking to enforce such a contract must bring it within well known exceptions in order to sustain it. *Lange v. Werk*, 2 Ohio St. 519; *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *State v. Gage*, 72 Ohio St. 210.

In *State v. Gage*, *supra*, page 231, the court having before it the construction of the Valentine act, an act intended to prohibit the formation of trusts in Ohio, said: "Every contract in restraint of trade is void if nothing else appears."

Does this contract fall within any of the exceptions to the rule laid down in the *Lange* case?

Does the testimony establish the fact that * * * "restraints placed upon trade were reasonable in view of the circumstances and purposes of their execution?"

Does the contract show * * * "that the restraint was an incident to the transfer of property which, notwithstanding the transfer, was to be used for purposes of trade and commerce?"

If the answer furnished by the testimony is in the negative, then the doctrine laid down in *Field Cordage Co. v. Cordage Co.* *supra*, page 615, announced by Judge Shauck, is directly in point, and the conclusion is inevitable that the contract is void, because * * * "every contract is void whose only purpose is to place restraint upon trade, however narrow may be the field of its operation."

It seems entirely plain from the testimony that the object of this contract was to destroy natural competition and that the plain purpose effected an injury to the consumer of the product and that the object necessarily accomplished was the creation, to an extent, of a monopoly against which the law has declared in numerous authorities. *Arnot v. Coal Co.* 68 N. Y. 558 [23 Am. Rep. 190]; *Craft v. McConoughy*, 79 Ill. 346 [22 Am. Rep. 171]; *Richardson v. Buhl*, 77 Mich. 632 [43 N. W. Rep. 1102; 6 L. R. A. 457]; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Candle Co.* 47 Ohio St. 320 [24 N. E. Rep. 660; 21 Am. St. Rep. 819].

A careful examination of the authorities in our own state do not lead us to the conclusion that the business, as such, was intended to furnish any exception to this rule, and therefore, we have not given weight and consideration to the Indiana authorities relied upon by the court below.

The laws of Ohio in regard to the liquor traffic have always been more liberally construed than those of her sister state, Indiana, and moreover, *Lange v. Werk*, *supra*, makes no exception to the rule therein announced, but distinctly says: "All contracts * * * shall be void," etc.

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We can find no Ohio authority which authorizes us to engraft any exception to the rule as founded upon the kind of business.

We are therefore of the opinion from a reading of the testimony and authorities that nothing in this contract furnishes exception to the rule as stated, and that therefore the doctrine as cited in *Field Cordage Co. v. Cordage Co. supra*, that "a contract in restraint of trade is always void, if nothing more appears," should apply in this case and injunctive relief ought therefore to be denied. *Morris Run Coal Co. v. Coal Co.* 68 Pa. St. 173 [8 Am. Rep. 159]; *Carroll v. Giles*, 30 S. C. 412 [9 S. E. Rep. 422; 4 L. R. A. 154].

Thus concluding, we are of the opinion that the relief sought for by the plaintiff in error and the cross petitioner in error should be granted.

Judgment accordingly.

Hoffheimer and Caldwell, JJ., concur.

BENEFICIAL INSURANCE.

[Superior Court of Cincinnati, Special Term, July, 1906.]

JAMES A. INGRAM v. NATIONAL UNION ET AL.

1. BENEFICIAL INSURANCE COMPANY, IF REPRESENTATIVE BODY, MAY NOT BE ENJOINED FROM DIVERTING MONEY FROM ONE FUND TO ANOTHER IN ABSENCE OF FRAUD, DECEIT, OR BREACH OF CONTRACT.

A beneficial insurance order, organized under the laws of Ohio, and being a representative association in its form of government, under the definition laid down in Rev. Stat. 3631-13 (Lan. 5811; 97 O. L. 422) may not be enjoined by a member thereof, whose certificate of membership shows him to be subject to the rules and regulations thereof in existence at the time of his becoming a member and to be thereafter enacted, from diverting moneys, from certain funds to be used to meet growing expenses and obligations, where there is no showing of fraud or deceit, or of a breach of contract between member and order, and the act contemplated is one which is, by the rules of the order, left to the discretion of the governing body.

[For other cases in point, see 1 Cyc. Dig., "Beneficial Associations," §§ 132-135, 158, 159.—Ed.]

2. "NATIONAL UNION" IS REPRESENTATIVE BODY UNDER OUR STATUTES.

The beneficial insurance order known as the "National Union" is a representative body, the rules of which afford a proper method of review to an aggrieved member.

[For other cases in point, see 1 Cyc. Dig., "Beneficial Associations," §§ 109-131.—Ed.]

J. T. Harrison and C. B. Matthews, for plaintiff:

Character and definition of beneficial association. 3 Am. & Eng. Enc. Law (2 ed.) 1043.

The certificate of membership of beneficial associations is to be regarded as a contract between the member and the association, just as

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a life insurance policy. *Niblack, Ben. Soc.* 407, Par. 213; *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189 [10 N. E. Rep. 79]; *Holland v. Taylor*, 111 Ind. 121 [12 N. E. Rep. 116]; *Supreme Lodge v. Knight*, 117 Ind. 489 [20 N. E. Rep. 479; 3 L. R. A. 409]; *Bacon, Ben. Soc. Par.* 78, 740.

Change of plan. *Mutual Assur. Soc. v. Korn*, 10 U. S. (6 Cranch.) 396 [3 L. Ed. 383]; *Niblack, Ben. Soc.* 58, Par. 25.

Notice. *Niblack, Ben. Soc.* 475.

Construction of by-laws. *People v. Fire Department*, 31 Mich. 458; 5 Am. & Eng. Enc. Law (2 ed.) 96.

See numerous decisions cited, and *Northern Liberties v. Gas Co.* 12 Pa. St. 318; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *Commonwealth v. Benevolent Soc.* 2 Binn. 441 [4 Am. Dec. 453]; *Commonwealth v. Cain*, 5 Serg. & R. 510.

Forfeiture of membership. *Niblack, Ben. Soc.* 477.

Assessments must be properly levied, and for proper purposes. *Hogan v. Endowment League*, 99 Cal. 248 [33 Pac. Rep. 924]; *Crossman v. Benefit Assn.* 143 Mass. 435 [9 N. E. Rep. 753]; *Chicago Mut. Life Indemnity Assn. v. Hunt*, 127 Ill. 257 [20 N. E. Rep. 55; 2 L. R. A. 549]; *Bacon, Ben. Soc. Sec.* 387; *Abels v. McKeen*, 18 N. J. Eq. 462.

A society will not be permitted to do that which is either expressly or impliedly prohibited by its charter and by-laws, and any effort so to do will be restrained by injunction at the instance of any one interested. 2 Am. & Eng. Enc. Law (1 ed.) 173.

In an action in favor of the corporation, the policyholder need not notify the governing body to bring action, where the wrong is committed by that governing body itself. *Clark & Marshall, Priv. Corp. Secs.* 536, 539, 543.

Apart from the enjoyment and administration of a person's own property there can be no constitutional protection which is effectual. *State v. Neff*, 52 Ohio St. 375 [40 N. E. Rep. 720; 28 L. R. A. 409]; *Secs.* 1, 2, 16, Art. 1; *Secs.* 26, 28, Art. 2; *Secs.* 26, 28, Art. 4; *Sec.* 2, Art. 13.

Jurisdiction of the court. *Gilman v. Tucker*, 128 N. Y. 190 [28 N. E. Rep. 1040; 13 L. R. A. 304; 26 Am. St. Rep. 464]; *State v. Berkley*, 92 Mo. 41 [4 S. W. Rep. 24]; *State v. Noble*, 118 Ind. 350 [21 N. E. Rep. 244; 4 L. R. A. 101; 10 Am. St. Rep. 143]; *Allison v. Railway*, 72 Ky. (9 Bush.) 247; *Lee v. Kalamazoo Co. (Circ. Judge)* 101 Mich. 406 [59 N. W. Rep. 644]; *Robinson, Ex parte*, 86 U. S. (19 Wall.) 505 [22 L. Ed. 205]; *Hale v. Tyler*, 115 Fed. Rep. 833.

The changing of the by-laws of a fraternal insurance company does not apply to any of the contract rights of a policy holder, but merely to his conduct as a member of the association. *Parish v. Produce Exchange*, 169 N. Y. 34 [61 N. E. Rep. 977; 56 L. R. A. 149]; *Langan v.*

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Legion of Honor, 174 N. Y. 266 [66 N. E. Rep. 932]; *Shipman v. Protected Home Circle*, 174 N. Y. 398 [67 N. E. Rep. 83; 63 L. R. A. 347]; *Becker v. Benefit Soc.* 144 Pa. St. 232 [22 Atl. Rep. 699; 27 Am. St. Rep. 624]; *Newhall v. Legion of Honor*, 181 Mass. 111 [63 N. E. Rep. 1]; *Knights Templars' & Masons' L. Indem. Co. v. Jarman*, 104 Fed. Rep. 638 [44 C. C. A. 93]; *Russ v. Legion of Honor*, 110 La. 588 [34 So. Rep. 697; 98 Am. St. Rep. 469]; *Morton v. Royal League*, 100 Mo. App. 76 [73 S. W. Rep. 259]; *Knights Templars' & Masons' L. Indem. Co. v. Vail*, 206 Ill. 404 [68 N. E. Rep. 1103]; *Campbell v. American Ben. Club Fraternity*, 100 Mo. App. 249 [73 S. W. Rep. 342]; *Miller v. Tuttle*, 73 Pac. Rep. 88 (Kan.); *Sisson v. Court of Honor*, 104 Mo. App. 54 [78 S. W. Rep. 297]; *State v. Life Assn.* 38 Ohio St. 281; *Hildreth v. Knights of Phythias*, 11 Dec. 622 (8 N. P. 540).

C. W. Baker and C. J. Kavanagh, for defendants.

FERRIS, J.

The defendant, the National Union, is a corporation under the laws of Ohio, whose principal place of business is in the city of Toledo, Lucas county, Ohio. The S. P. Chase Council is a local branch of said National Union, doing business in the city of Cincinnati. The National Union is a secret order formed and conducted for the benefit of its members and their families according to a set of rules and regulations adopted by the legislative branch known as the senate, and among other things provision is made for the creation of a benefit fund from which on proof of death payments are made to those beneficially interested. These payments and the manner of the collection of the same are provided for by rules and regulations. Certain other funds were also collected and placed to the credit of either the benefit, the general, the special or the building fund, all in accordance with the provision of laws as interpreted by the senate, the highest legislative body within the organization. From time to time in the evolution of business various enactments have been made by which dues have been largely increased. Expenses have grown to an extent so much larger than what was originally in contemplation that this petitioner for himself and all others similarly interested asked the court, while not charging fraud in the management, to enjoin the authorities in the National Union from diverting moneys collected by assessment on the table of rates for expenses and to enjoin them from appropriating to the general fund moneys collected for the benefit fund, and the court is further asked to enjoin the S. P. Chase Council No. 457 from transmitting assessments or moneys received by it to the National Union.

The application now made seeks in general to have this court examine into the internal organization, and particularly the methods of assessment for expenses, and also to make an examination to determine

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whether the affairs of this fraternal organization have been managed in accordance with the rules, regulations and requirements which they themselves agreed should govern them in the conduct of their affairs. To this petition demurrers have been filed both by the Chase Council and by the National Union, upon three grounds:

1. That the plaintiff had not the capacity to sue.
2. That the court had no jurisdiction over the subject-matter.
3. A general demurrer was filed stating that the petition did not set forth a cause of action.

The court has heretofore announced its opinion upon these propositions, overruling the demurrers, and thereupon the case came on for hearing upon its merits, and the defendants having by answer put in issue the facts upon which the plaintiffs must rely, the case will now be decided upon such facts as appear in the testimony had upon the hearing.

The facts as shown by the testimony indicate a phenomenal growth in the membership of this organization and a successful general result. Manifestly, new duties and obligations arose in the development of the business that necessitated the adoption of new policies and the making of new tables, and an increase in expense account necessarily incident to the growth of the business. The testimony shows that such a state of affairs existed as required a complete reformation of the rate tables, and under expert advice the affairs of the association were placed upon what was deemed to be a safe and sane position. The testimony shows that in the light of circumstances existing at the time of the making of the change complained of, the action on the part of the officers of the National Union was within the power designated in the constitution. There is no question made by any of the authors on fraternal and benevolent insurance companies as to the right—and in fact legal duty—to provide by proper enactment for the payment of certain obligations, and whenever there appear to courts matters of complaint relating to internal management and matters of economy about which honest men differ, courts are slow to grant relief, and never interfere unless the testimony is of a character to indicate either fraud in management or bad faith that justifies equitable interference. There is every reason why this rule should be followed, denying judicial interference. Every reason exists why men charged with so high and sacred a trust as the management of a mortuary fund should exercise the highest degree of care. This fund in its very nature is of the most sacred character, involving the interests of widows and orphans and those who are not able to protect themselves. These same facts and these relations and conditions would justify the interference by a court with parties who were recreant to a trust of this character.

It will be conceded that there is no different rule in law relating

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to the enforcement of contracts, whether they be of the character of a policy in a fraternal insurance company or of a character relating to the purchase and sale of a commodity. The court is not here to make a contract, but to enforce arrangements as agreed upon, and it will be admitted as a primary proposition that it is not within the power of the National Union by legislation to destroy obligations that have been theretofore entered into between the association and its members. But it will be observed that this is a mutual company, members doing business *inter se*, delegating the right to make proper rules and regulations binding all from time to time for the mutual benefit of all concerned. This right to legislate is one of the inherent powers of the union, a necessary and indispensable power. The organic body is charged with the duty of placing upon the books such rules of action as shall be for the common benefit of all, and while they are authorized to legislate in the general direction of preserving all interests committed to them, the policy of the law would deny them in such activity to go to the length of destroying vested rights. But within proper limitations no court will interfere with legislation that is properly inferable from the inherent nature of the organization itself. If, therefore, it shall appear in a given case that the representative body has acted along lines dictated by a proper translation of the rules of that order, courts will not interfere to prevent the exercise of such activities. Matters relating to the internal policies of the organization, when free from questions of fraud or deceit, form no proper predicate for judicial examination. Particularly is this so when the rules of the order present a proper method of review, so that one aggrieved may find in a reviewing body the fullest opportunity for having his wrongs, whether real or imaginative, reviewed.

Judge J. M. Smith, in *Steuve v. Grand Lodge*, 3 Circ. Dec. 231, 233 (5 R. 471), understood this to be the rule on the subject, for he says:

"We understand the law to be, that when a person becomes a member of an association of this kind, he becomes subject to the laws, rules and regulations of such association, and that he cannot properly resort to the courts for relief or redress, unless there has been an invasion by the society of some property right of his, as by the breach of some vested contract made with him, or when some act has been done by the society without any authority, which infringes upon some property right of his. That if by the constitution of such association, or the rules and regulations legally adopted by it, any body or judicatory thereof has the clear right to legislate in regard to the interests of such association, or to administer its affairs according to its judgment or discretion, and to alter or change its rules and regulations, the members of the association are bound thereby."

It will be conceded in this connection that it would be entirely beyond the power of the supreme body, the senate, to make a contract

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in derogation or in contravention of their own law. The senate would not have the right to destroy in building up. It would not have the right to perpetrate a fraud upon persons who in good faith had entered into a general plan of insurance at an earlier age, that would be defeated by rules made operative in their advanced years. And yet the general plan entered into would be binding upon all to carry to a successful conclusion the general scheme adopted for the benefit of all concerned. This inherent power, that must in the nature of things be vested in the legislative branch to provide by suitable legislation such measures as will meet the contingencies that from time to time arise, leaves large discretionary power to those in control. Such discretion is not reviewable by the courts unless abused. *Sims v. Railway*, 37 Ohio St. 556.

The National Union is an Ohio corporation, and therefore we must look to the laws of this state for the purpose of determining what are its powers. Complaint is made that it is not a representative body. The court finds the fact to be otherwise, and from every definition examined the test seems unanswerable, and there does not seem to be, therefore, any ground of complaint growing out of the unconstitutionality of the defendant body. There seems nothing to which the attention of the court has been called that furnishes a predicate for the conclusion that it is not the kind of a representative body that is provided for in the constitution and by-laws. The various sections of the statute providing for the creation and the regulation of such companies confirms this view, and if any doubt remained it would be dissipated by the reading of 97 O. L. 422, Sec. 3 (Rev. Stat. 3631-13; Lan. 5811), which provides that,

“Any association shall be deemed to have a representative form of government, when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws, provided that the elected representatives shall constitute a majority in number and have not less than a majority of the votes, nor less than the votes required to amend its constitution and laws, and provided further that the meetings of the supreme or governing body and the election of officers shall be held as often as once in four years.”

The provisions of the statute governing this institution fully justify the creation of the fund about which complaint is made, and would carry with it authority for the collection of the same, and would leave properly to the governing body the manner in which such assessments should be collected, and also would vest in that body full authority for determining the manner of the application of payments—in other words, all questions of disbursements. Manifestly, the limitation would deny the

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right to create a levy for one purpose and apply the proceeds to another, and yet if in good faith the properly constituted authorities should tax such fund with a proper share of the expense incident to collections, no reasonable complaint could be made, nor if two assessments were made at one and the same time for different purposes, could a just ground of complaint be lodged. These are matters that are discretionary in the nature of things, and are not subject, therefore, of review, except as above stated.

Questions of economy are ordinarily questions of good judgment and sound discretion about which mistakes occur, and are frequently the cause of honest criticism, and yet as a rule all such questions fall within the general doctrine that they are to be regulated by the bodies themselves rather than the court. They are matters of internal policy, and the books agree that these are not subject-matter for courts.

The attention of the court has been called to certain proceedings which form the predicate of what are known as the amendments of 1904. It is urged that they were without warrant in law and are void and inoperative and not binding upon the plaintiff in this case and those for whom he speaks. The statutes of this state have recognized the governing body of the National Union as a representative government within the meaning of 97 O. L. 421. There is nothing in the testimony to indicate that the senate, as originally constituted and as now existing, is not in all respects in harmony with that act. In any and all events, it is perfectly apparent from the testimony that nothing has taken place in all of the various matters to which the attention of the court has been called to which the petitioner and others have not assented in the obligation, which reads that,

"This certificate is granted upon the express condition that——complies in the future with the laws, rules and regulations controlling said benefit fund or that shall be hereafter enacted by the senate to govern said council and fund."

There could be no such thing as continuity of such organizations, unless members of bodies representing mutual interests were to agree among themselves to be bound and governed in their dealings by all reasonable rules and regulations that might be subsequently enacted touching their interests. The court finds as a conclusion from the testimony in this case that such changes only were made in the original plan as were reasonably in contemplation at the time of the entering into of the contract; that such conditions subsequently occurred as made it necessary to pursue a different course, entailing a larger expense, and disappointing no doubt in its general results, but nevertheless changes were made by those in authority essential to the perpetuity of the organization and I find the facts so to be. No one could have foreseen in the ordinary course of events the growth of this organization nor its obligations and

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liabilities. They came; they had to be met, and dictates of prudence and necessity required a change. Such change brought increased expense and added obligation. But who shall say from the testimony in this case that the parties acted not in good faith or from selfish motives and are to receive the opprobrium of being unjust stewards? There is nothing to warrant this conclusion. Men charged with the obligation of carrying out the instructions of their superiors are not presumed to be men of unusual type, but ordinary men, men imbued with a sense of honesty and efficiency and to exercise ordinary care, and when they have so acted are not to be reviewed by the courts, but by those to whom they in the nature of things must respond.

In conclusion, my examination of this case does not lead me to believe that there is anything in the testimony that justifies equitable interference, and for that reason the prayer of the petition is denied.

WILLS—TRUSTS AND TRUSTEES.

[Hamilton Common Pleas, 1906.]

LAWRENCE POLAND ET AL., EXRS., V. ST. JOSEPH'S ORPHAN ASYLUM ET AL.

1. PROVISION OF WILL GIVING ABSOLUTE ESTATE TO DEVISEE FOLLOWED BY A CLAUSE GIVING THE SAME TO ANOTHER "AFTER THE DEATH" OF THE FIRST DEVISEE GIVES LIFE ESTATE TO SUCH DEVISEE.

A will whereby a testator, in one item, gives to his sister all the remainder of his estate, after the payment of certain bequests, without other words of qualification, and, in a later section, gives all his estate, "after the death of my sister and myself," in trust for a charitable purpose, must be construed to give a life estate to the sister and the remainder absolutely to the trustee. The words, "and myself," in the later item may be ignored.

[For other cases in point, see 2 Cyc. Dig., "Charities," §§ 67-83; 7 Cyc. Dig., "Wills," §§ 723-731, 807-817, 940-946.—Ed.]

2. TESTAMENTARY TRUSTEE WITHOUT EXPRESS DISCRETIONARY POWER MAY AGREE ON CONSTRUCTION OF WILL IF IN GOOD FAITH, ON ADVICE OF COUNSEL AND FOR THE INTERESTS OF HIS TRUST.

An agreement as to the true construction of ambiguous clauses in a will, entered into in good faith, and on the advice of competent counsel, as being beneficial to the *cestui qui trust*, and made for the purpose of avoiding a suit to construe the will and thus, indirectly but materially, assisting in successfully resisting a contest over the will, will be sustained where a question is made as to the authority and power of the trustee to make such an agreement, no discretionary power having been given him by the will.

[For other cases in point, see 7 Cyc. Dig., "Wills," §§ 947-952.—Ed.]

O. J. Cosgrave, for plaintiffs:

When an estate is devised with an absolute power of disposal, a devise over of what may remain is void, but that where a life estate only is given in express words to the first taker, with an express power in a certain event, or for a certain purpose, to dispose of the property,

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the life estate is not, by such a power, enlarged to a fee or absolute right, and the devise over is good. *Widows' Home v. Lippardt*, 70 Ohio St. 261 [71 N. E. Rep. 770]; *Baxter v. Bowyer*, 19 Ohio St. 490; *Johnson v. Johnson*, 51 Ohio St. 446 [38 N. E. Rep. 61].

An interest or estate in one clause given in clear and decisive terms is not to be taken away or cut down by a doubt as to the extent of or inference from a subsequent clause, nor by any subsequent words less clear and decisive than the gift. *Collins v. Collins*, 40 Ohio St. 353; *Parker v. Parker*, 13 Ohio St. 95; *Pendleton v. Bowler*, 11 Dec. Re. 551 (27 Bull. 313); *Steuer v. Steuer*, 28 O. C. C. 145; *Stuart v. Walker*, 72 Me. 145 [39 Am. Rep. 311]; *Parker v. Parker*, 13 Ohio St. 95; *Davis v. Boggs*, 20 Ohio St. 550.

The limitation is void as well of personal as of real property. *Pickering v. Langdon*, 22 Me. 413; *Cole v. Cole*, 79 Va. 251; *Holmes v. Warden*, 8 De. G. M. & G. 152.

It is the disposition of courts to adopt such a construction as will give the use of an inheritance to the first donee. *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34 [28 Am. Rep. 1]; *Stuart v. Walker*, 72 Me. 145 [39 Am. Rep. 311]; *Collins v. Collins*, 40 Ohio St. 353; *Larwill v. Ewing*, 73 Ohio St. 177.

Reasonableness in the exercise of discretion. *Beach*, Trusts Pars. 455, 589; *Perry*, Trusts Par. 482; *Lewin*, Trusts 591; *Tiffany & Bullard*, Trusts 733; *Chaplin*, Trusts 469, 470, 471; *Gelston v. Shields*, 16 Hun 143; affirmed, *Gelston v. Shields*, 78 N. Y. 275.

J. L. Lincoln and D. T. Cash, for defendants.

SWING, J.

I am called upon, first to construe items five and six of the will of Gregory Rossiter, deceased, and second to determine the effect of an agreement in writing entered into by Mary L. Rossiter and the late Rev. William Henry Elder, archbishop, as trustee under the will of St. Joseph's Orphan Asylum, as to the true construction of said items of the will.

I am disposed to say here at the outset, that I am of opinion that it was the intention of the testator by said two items of his will, to give to his sister, Mary L. Rossiter, a life estate in his real estate and the use of his personal estate for her life with remainder in the whole estate, the fee in the real estate and the absolute ownership of the personal estate (after payment of previous bequests) to Archbishop Elder and his successors in trust for the St. Joseph's Orphan Asylum.

It is true that by item five the testator seems to devise the whole of the remainder of his estate, after payment of previous bequests, to Mary L. Rossiter. He says:

"I do give all the remainder of my estate of every description"

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(then mentioning "cash, stocks, bonds and credits," and excepting "proceeds of sale of real estate in Cincinnati") "to my sister, Mary L. Rossiter."

I think it not doubtful that these words standing alone would vest the whole estate, after payment of previous bequests, in Mary L. Rossiter.

But in item six he says:

"After the death of my sister, Mary L. Rossiter, and myself, I give and bequeath to the Most Rev. William Henry Elder, the Catholic archbishop, etc., and his successor in office, all my real estate and personal property of every description wherever situated that I may own, etc., at the time of my death, etc., etc., for the benefit of the St. Joseph's Orphan Asylum."

Remark has been made about the use of the words, "my sister and myself," but I take it the words "and myself" are not significant. The testator wrote the will himself. He was not a lawyer and not skilled in the use of language in writing, and I think he made a careless and awkward expression, meaning nothing more than "after my death and the death of my sister." Really I think the words, "and myself," might have been omitted without altering the sense.

So regarding the words, "and myself," item six, as I think, devises the whole estate, real and personal "after the death" of Mary L. Rossiter, to the archbishop in trust.

Now, I see no sufficient reason why effect should not be given to both items, construing them together, by holding that it was the intention of the testator to give the estate, real and personal, to Mary L. Rossiter for life and at her death ("after the death of my sister") to the archbishop in trust, etc.

I think the intention must, without reference to authorities, be held to be as I have here stated. But I think such construction in accordance with recognized rules of construction.

Schouler, Wills Sec. 560, it is said:

A remainder over after a gift of a fee simple, or upon an absolute gift of personal property, is void at common law, and this rule is now in force except where specifically modified by statute. The rule that the remainder over is void is applied, however, only where it clearly appears that the first beneficiary is to get an absolute interest. Where it is possible to reconcile the two gifts by construing the first as a life estate only, this will be done.

This I take undoubtedly to be the true rule. I also take it to be possible and not difficult "to reconcile the two gifts (items five and six) by construing the first as a life estate only."

If item five had said "to my sister for life," and item six (as it does) "after the death of my sister," there would be no room for ques-

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tion. So I take it that when item six says, "after the death of my sister," it implies that the interest was for her life, just as if it had said "for her life." In any other view, the words, "after the death of my sister," would seem to me without meaning.

In the case of *Stivers v. Gardner*, 88 Iowa 307 [55 N. W. Rep. 516], it is said in the syllabus:

"Wills—Construction—Limitation of General Devise.—A married woman, in one clause of her will, devised certain real estate in general to her husband. Another clause provided that upon the death of her husband, all of said lands should go to the testator's son, burdened with a payment to be made by the son to her daughter. In a subsequent clause, the testator gave all her personal property, in equal shares, to her son and daughter, with the provision that her husband should have it during life, to control, manage and use as his own. The last clause of the will was as follows: 'But if my said husband should get married after my death, in that event, all of my said property, both real and personal, to revert to my said son and daughter:' *Held*, that the husband's interest in the real estate terminated with his marriage."

There are several matters stated in this syllabus, but there was first, in the will "a devise of certain real estate in general to her husband," and second, in "another clause," a provision that "upon the death of the husband all of said lands should go to the testator's son," etc.

The matter is clearly stated in the opinion of the court, pages 310 and 311. It is said in the opinion:

"The real controversy presented by the record is whether the devise of the land to Thomas K. Scotthorn was a devise in fee simple. It is claimed by the plaintiffs that the estate created by the will was an absolute devise. On the other hand, the defendant claims that the estate created by the will was for life only, and that the life estate was subject to be defeated by the subsequent marriage of Scotthorn. We are united in the opinion that by a proper construction of this will Scotthorn took a life estate, and that said estate terminated upon his marriage."

The point is, that he took only a life estate. The matter of the marriage does not affect the construction in that respect.

It is further said in the opinion:

"Counsel for plaintiffs state their claim in argument in the following language: 'The will devises to the testator's husband in fee simple the real estate, without restriction or limitation (which is shown by the petition to be all her lands), and the subsequent directions as to its disposition after the death of the husband are simply precatory in character, and cannot affect the absolute, unconditional title conveyed by the will.'"

The court say of this, page 311, that the provisions "are not repug-

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nant because they all relate to the same subject. They denote the intention of the testator that the husband shall take the estate for life, or so long as he shall remain unmarried, and that at his death or marriage it shall descend to the children."

The court also say:

"Counsel cite a number of cases in this court as sustaining the claim that the devise to her husband was absolute * * *. An examination of these cases will show that this court has at no time relaxed the rule above announced that the whole instrument must be considered in arriving at the intention of the testator."

I have quoted thus fully from the Iowa case because it is about as near like the case at bar as one will case is likely to be like another, and is, as I think, really a case in point, as to the language of the will and the construction given to it by the court. I may add as a remark about the Iowa case as showing that the provision as to the marriage of the husband does not affect the question as to the life estate, that if the condition as to marriage were applied to a fee expressly given, it would have the same effect as when applied to a life estate.

It is said in *Collins v. Collins*, 40 Ohio St. 353-362:

"The fee simple devised was not indefeasible, but subject to be divested upon the contingency expressed"—though the contingency in that case was not marriage, but death. But this does not need authority. I do not see that the language of our Supreme Court in *Collins v. Collins*, *supra*, as quoted by counsel for plaintiffs here in his able and very interesting brief, is at all in conflict with the rule as stated in the authorities I have quoted. It is indeed said:

"The terms employed to limit or qualify a gift already made must, to be effective, be as clear and significant as those in which it is made."

More to the same effect is quoted by counsel, but I think the language in item six in the Rossiter will is "as clear and significant" as that in item five, if not a little more so.

I think also that the words of our Supreme Court in *Robbins v. Smith*, 72 Ohio St. 1, 12-16 [73 N. E. Rep. 1051], as quoted by defendants in their brief, is to the same effect as the language I have quoted from the Iowa case.

Applying the rules as best I can, I give to items five and six the construction stated at the outset of this opinion—a life estate in realty and personalty to Mary L. Rossiter, remainder in fee in the real estate and absolute ownership of the personal estate in the Archbishop in trust, after the death of Mary L. Rossiter.

But the next question in the case, growing out of the agreement in writing by Miss Rossiter and Archbishop Elder as to the true construction and their construction of said items five and six is, to my mind, more difficult.

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Shortly after the death of Gregory Rossiter and the probate of his will, Mary L. Rossiter and Archbishop Elder, acting in his capacity as trustee under said will for the benefit of St. Joseph's Orphan Asylum, entered into an agreement in writing as follows, to wit:

"Whereas, the last will and testament of Gregory Rossiter, deceased, was duly probated on June 26, 1899, case No. 48064, Hamilton county, Ohio, probate court; and

"Whereas, some doubt or question may exist or hereafter arise as to the true meaning or construction to be given to items five and six of said will as to the legal disposition of the personal property of said decedent; and

"Whereas, it is manifest to our minds that the decedent in referring to personal property in said item six intended thereby to mean and refer to personal property growing out of the investment of the proceeds arising from the sale of real estate, if any should be sold by Mary L. Rossiter, and to no other personal property, or intended to refer to leasehold property as personal property:

"Now, therefore, know all men, that we, the undersigned, Mary L. Rossiter, sister of said decedent, and Most Rev. William Henry Elder, Catholic archbishop of Cincinnati, Ohio, a beneficiary trustee under said will, for and in consideration of the avoidance of litigation and in consideration of mutual concessions tending thereto, hereby agree for ourselves and those who may come after us, that the real and true construction and meaning to be given to said items five and six and to all of said will shall be given as follows:

"First. That Mary L. Rossiter shall have the use of and the income of all the real estate of the decedent during her lifetime and such other power over the same as the will provides.

"Second. That said Mary L. Rossiter shall have all the personal property of the decedent, including cash in hand, stocks, bonds and credits and other personal property absolutely as her own.

"Third. That at the death of said Mary L. Rossiter the real estate of the decedent shall pass to and vest absolutely in the Most Rev. William Henry Elder, Archbishop as aforesaid, or his successor in office, in trust nevertheless for the uses and purposes set forth in said will.

"Fourth. That after the death of said Mary L. Rossiter any personal property, the proceeds from the sale of real estate of the decedent made by said Mary L. Rossiter under authority of the will, or any real estate or securities in which such proceeds shall be invested, shall pass to and vest absolutely in said Most Rev. William Henry Elder, Archbishop as aforesaid, or his successor in office, in trust nevertheless for the uses and purposes set forth in said will.

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"In witness whereof, we have hereunto set our hands in duplicate this thirtieth day of June, 1889.

"MARY L. ROSSITER,

"WILLIAM HENRY ELDER,

"Catholic Archbishop of Cincinnati."

In this paper the parties to it agreed that by the true construction of said items five and six, Mary L. Rossiter took, was intended by the testator to take, the personal estate absolutely, and a life estate in the real estate with remainder to the archbishop in trust. It is claimed by the plaintiffs, representatives of Mary L. Rossiter, deceased, that this was a valid agreement and is binding on the defendant, Archbishop Moeller, successor to Archbishop Elder, as trustee under said will; while it is claimed by defendants that the agreement has no binding force; that the agreed construction is not the true construction; that the agreement was without valid consideration, and that it was not in the power of the trustee under the will to bind his successor or his *cestui que trust* by such an agreement.

I am of opinion that the construction agreed upon is not the true construction of the will, as I have already set forth. But the evidence in the case, chiefly the testimony of Mr. Cosgrave, shows the circumstances under which the agreement was made, the reasons and consideration for it, if consideration in the legal sense there can be said to have been.

The facts are substantially these:

George Rossiter left his unmarried sister, Mary L., and some nephews and nieces, children of a deceased brother or sister, his next of kin. He devised nothing to the nephews and nieces. They were much dissatisfied with the will and threatened a suit to contest it, which suit was afterward commenced and prosecuted. Mary L. Rossiter, though herself in good circumstances, was displeased with the devise to her if taken to mean, as I have held, that it gave her only a life estate in the real estate and the use of the personal property for life. But she and her counsel, Mr. Cosgrave, claimed that by the true construction she was entitled to more. For one thing, they claimed that the two items, five and six, were repugnant, each purporting to give the whole estate, but to different persons, and that by the general rule in such case the latter item, six, must fail. They also claimed that the designation of "cash, stocks, bonds and credits" in item five, not specifically mentioning real estate, was significant and indicated that he referred to the personal estate certainly in the absolute devise, clearly intending to give it at least absolutely to Mary L., and that whatever the effect of item six as to the real estate, even though it gave the real estate in fee to the archbishop, it did not affect the absolute devise of personalty in item five to Miss Rossiter, and these

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contentions and others are still earnestly made by Mr. Cosgrave in this case.

Miss Rossiter and her brother Gregory had been devoted to each other, had lived together, both unmarried, and she was not disposed to contest his will, but was dissatisfied with it if construed as I have construed it, and might have brought a suit to construe it according to the claims of herself and her counsel as to its true meaning, if the agreement as to its meaning had not been made. Mr. Cosgrave, her counsel, conferred with Archbishop Elder about the whole situation, taking into consideration the dissatisfaction of Miss Rossiter and the above-stated contentions as to the true meaning of the will, and also the purpose of the nephews and nieces to contest the will, and so, if successful, deprive the archbishop, as trustee, of all benefit under the will. It was open to the archbishop, if within his power, as trustee, to agree with Miss Rossiter upon the construction that was agreed upon, and so prevent a suit to construe the will and at the same time secure the active support of Miss Mary L. Rossiter in sustaining the will in the threatened suit by the nephews and nieces to contest the will, thus, if successful in sustaining the will, making sure of the real estate, which was much the larger part of the whole estate. Mr. Cosgrave, a lawyer of ability and high character, himself a devoted Catholic, appears to have acted from high and disinterested motives in the matter as between the archbishop and Miss Rossiter, and to have consulted with them and advised them both in perfect good faith, and for what he believed the best interests of the trust devised to the archbishop. He wanted the will sustained and thought it important, as it undoubtedly was, that it should be actively supported by Miss Rossiter, the only surviving sister of testator, with whom the testator had been most intimately associated during their lives. It appears that Mr. Cosgrave and Miss Rossiter and Archbishop Elder were all convinced that the construction agreed upon was the true construction, for the agreement itself, prepared by Mr. Cosgrave, and signed by the parties, substantially so recites. They were all of opinion also that a settlement of any difference of opinion that might arise in the minds of any persons concerned, as to the true construction, by the agreement, thus avoiding a suit for construction and securing the active and earnest support of Miss Rossiter to the will, would be wise upon the part of the archbishop, as trustee, and greatly for the benefit of the trust. It was feared by the archbishop and Mr. Cosgrave advising him, that a suit to construe, setting out the provisions of the will alleged to be conflicting, would of itself have a bad effect upon the suit to contest the will, and that this together with any indifference or hostility towards the will by Miss Rossiter, so nearly related by ties of blood and affection to the testator in his lifetime, and a woman of fine character, might seriously

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endanger the whole estate in the suit to contest. So for all these reasons and considerations, carefully weighed, acting in good faith, upon conscientious and friendly legal advice, and believing himself to be acting for the good of the trust, the archbishop entered into the said agreement as to the construction that should be given to items five and six of the will, and Miss Rossiter was satisfied with the agreed construction and determined to resist any attack that might be made by the nephews and nieces upon the will. A suit to contest the will was commenced and prosecuted. Miss Rossiter engaged actively in support of the will, devoted her whole attention to it, employed counsel, and persisted in fighting it to a successful conclusion, refusing all suggestions of compromise. It should also be said that if the will had been set aside her interest in the estate would have been much greater than it was by the construction agreed upon.

Upon the first trial of the suit to contest, the jury rendered a verdict against the will, and the trial judge set aside the verdict. It was subsequently tried again to a jury and the verdict was again against the will. The trial judge upheld the verdict, and the case went to the circuit court, and the judgment of the court below was reversed, although one of the judges dissented as to the weight of the evidence. This ended the case. The contest was severe, each trial lasting five or six weeks.

The foregoing is, I think, a fair statement of all the facts and circumstances surrounding the execution of the agreement and the reasons for the making of the agreement.

Now, was it in the power of the archbishop, as trustee, to make such an agreement binding upon his successor and the *cestui que trust*? Had the trustee a discretion which he properly exercised?

The will does not purport to give the trustee any such discretion or any discretionary power. Nor do I think authorities cited by counsel for plaintiff as to the power of a trustee, "generally, acting in good faith to release or compound a debt due to the trust estate," are directly in point here, though the principle of them does have an important bearing on the question in this case. But I understand the authorities as to the power of a trustee to exercise a discretion under some circumstances, though not authorized by the will, to go much further than merely to authorize the release or compounding of a debt.

In 2 Perry, Trusts Sec. 475:

"In equity the *cestui que trust* is the owner, and the question in equity is, how far the trustee can act without exceeding his powers and rendering himself responsible to the *cestui que trust*. If the trust is a simple or passive one, to allow the beneficiary to occupy and enjoy the estate, the trustee has no power or duty to perform, except at the instance of the *cestui que trust*. In trusts of a more particular and active kind, the general power of the trustee is limited to the exact

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performance of the duty imposed upon him. The duty and power given in such trusts must be strictly performed. There is no room for discretion or divergence from the particular directions contained in the instrument, and where money is left to a trustee to be laid out in lands, he had no discretion to purchase land with a part of the moneys, and to expend the remainder in repairs and improvements."

This section states the rule with illustrations where there is no power whatever to exercise discretion, either given by the terms of the will or arising out of peculiar circumstances. But Sec. 476 is as follows:

"But there are circumstances where a trustee must exercise the discretionary power of an absolute owner, otherwise great loss might happen to the estate. The exigencies of the moment may demand immediate action. The *cestui que trust* may be numerous and scattered or under disability, or not in existence, so that their sanction cannot be obtained, or cannot be obtained without great inconvenience. The alternative of applying to the court may be attended with considerable or disproportionate expense, and perhaps delay, so that the opportunity is gone and lost forever. It is therefore evident that it is for the interest of the *cestui que trust* that the trustee should have a reasonable discretionary power to be exercised in emergencies, though no such power is given in the instrument of trust."

In the case of *Forshaw v. Higginson*, DeG. M. & G. 827, it is said in the syllabus:

"Where there was a reasonable ground for contending that a legacy was a charge upon an estate vested in trustees for sale, and they in the exercise of a *bona fide* discretion, for the purpose of satisfying a purchaser who refused to complete, unless the legacy was discharged, paid it: *Held*, that whether the objection would have been a tenable one or not, the payment ought to be allowed to the trustees as between them and the persons beneficially interested."

It is said in the opinion, page 831:

"This objection was of a serious character; it was at least reasonably arguable that the will made the legacy a charge upon the real estate; there was no proof of payment; it was at least reasonably arguable that without payment of it no effectual discharge could be given to the purchaser. The trustees acted *bona fide*; they were advised by competent solicitors, and it was thought the advisable course, to pay this legacy, which there was such reasonable ground for contending must be paid out of the proceeds of sale. They did so in the exercise of a reasonable and honest discretion, acting under good professional advice, and it is impossible, on materials before us, to say that a prudent, honest and well advised man might not have taken that course."

It is also said, page 833, speaking of the question whether the action of the trustees was within "the powers given by the deed:"

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"In my opinion, however, it is unnecessary to decide that point. The true question in this case, as I think is, whether the trustees, having acted *bona fide* in the best exercise of their discretion in making this payment, ought not to be allowed it" (the court cite *Blue v. Marshall*, 3 P. Wms. 381).

In *Harrison v. Randall*, Hare 396, Cases in Chancery, it is said in the syllabus:

"A trustee is not, in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interests of the *cestui que trust*; but where a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of satisfying the court that the deviation was necessary or beneficial."

These decisions and statements of the rule seem to warrant the statement in Perry, Trusts Sec. 476, above quoted, ending with the words:

"It is therefore evident that it is for the interest of the *cestui que trust* that the trustee should have a reasonable discretionary power to be exercised in emergencies though no such power is given in the instrument of trust."

As I have stated, the same principle seems to be involved in the authority held to be in a trustee to "under circumstances release and compound a debt."

In this case the agreement was entered into by the archbishop in good faith, upon the advice of good legal counsel, for what he believed the best interest of his *cestui que trust* and for what I believe was for its best interest, in an emergency, the *cestui que trust* being of such a character that it could not be consulted as an individual could be, and being an object of his special interest, and at a time when an application to the court to construe would possibly and probably have had a bad effect upon the interests of the *cestui que trust*, in the suit about to be brought to contest the will, and a failure to make the agreement might have resulted in the loss of the whole estate to the *cestui que trust*, for it is not doubtful that the active interest and service of Mary L. Rossiter in resisting the suit to contest the will contributed much to the final determination of that suit in favor of the will. The agreement was made by the archbishop in the careful and wise defense of his title which was about to be assailed and which, but for the agreement, it was feared, might be wholly lost.

I may say also that although I am convinced that the agreed construction is not the true construction, the question may be said to be fairly arguable, the contention being based upon the old established rule as to repugnant bequests, and also upon other grounds, and in this case the will having been drawn by a layman, and not well drawn; and a construction different from that which I believe the true one has been

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contended for with ability and apparent sincerity by counsel for plaintiffs, both in oral arguments and by briefs in this case, and I cannot but recognize the possibility of some other court's taking a view of the will different from my own. Indeed, I might well have held, as the court said in *Forshaw v. Higginson*, *supra*: "It is unnecessary to decide that question. The true question" being as to "the trustees' having acted *bona fide* in the best exercise of their discretion" in making the agreement.

In view, therefore, of all these considerations, I am of opinion that the agreement ought to be upheld.

ABUTTING OWNER—FRANCHISE—STREET RAILWAY.

[Allen Common Pleas, December 15, 1906.]

LIMA (CITY) v. DANIEL CRAMER ET AL.

1. EXTENSION OF FRANCHISE OF STREET RAILWAY COMPANY.

Whenever in the opinion of the city council the public welfare would be promoted thereby, it may, by agreement with a street railway company, terminate all or a part of a grant previous to its expiration, and renew the franchise to such part, terminated for any period not in excess of the limitation fixed by statute, providing that the company is not released from any of its obligations under the old franchise.

[For other cases in point, see 7 Cyc. Dig., "Street Railways," §§ 130-134.—Ed.]

2. PUBLICATION OF NOTICE AND CONSENT OF OWNERS ON RENEWAL OF FRANCHISE.

Revised Statute 2502 (Lan. 3764) requiring the publication of notice and competition in rates in granting franchises for the use of streets for street railroad purposes does not apply to a renewal of the grant of such a franchise; nor is the consent of the abutting property owners a condition precedent to the validity of such grant.

[For other cases in point, see 7 Cyc. Dig., "Street Railways," §§ 225-227.—Ed.]

3. EXTENSION OF ROUTE OF ONE STREET RAILWAY COMPANY OVER ROUTE OF ANOTHER.

The route of one street railway company may, with the agreement with another company, be extended by ordinance of the city council over all or a part of the existing routes of such other company.

[For other cases in point, see 7 Cyc. Dig., "Street Railways," §§ 82-94.—Ed.]

4. REMEDY OF ABUTTING OWNER FOR DOUBLE-TRACKING STREET RAILWAY.

The remedy of an abutting owner who is injured by the double tracking of a street railway is private and the city solicitor cannot anticipate such injury with a remedy by injunction brought under Rev. Stat. 1777 (Lan. 3280).

[For other cases in point, see 7 Cyc. Dig., "Street Railways," §§ 82-94.—Ed.]

[Syllabus approved by the court.]

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APPLICATION for temporary injunction.

R. C. Eastman, city solicitor, and **J. W. Halfhill**, for plaintiff.

W. B. Richie and **D. J. Cable**, for defendants.

MATHERS, J.

This action is brought by the city solicitor of the city of Lima by favor of Rev. Stat. 1777 (Lan. 3280), which makes it the duty of such officer to apply to the courts for an injunction to prevent the abuse by the city of any of its corporate powers, or the execution and performance of any contract made in behalf of the corporation in contravention of the laws and ordinances governing the same. He sues, therefore, in behalf of the city. The defendants are the members of the council of said city, and the Lima Electric Railway and Light Company. The plaintiff seeks to restrain the defendant councilmen from taking any further action with reference to a certain ordinance which was passed by them as members of the council on November 5, 1906; which ordinance purported to extend for the full period allowed by law the right of the defendant railway company to operate and maintain its railroad in and along Bellefontaine avenue in the city of Lima.

The plaintiff contends that the action which the council took, and which it proposes to take, was an abuse of corporate power and was also in contravention of the laws governing the same. He bases his contention upon the claim that the Lima Electric Railway and Light Company has no valid franchise in said Bellefontaine avenue; and that if it has, the ordinance referred to was passed without giving the notice by publication required by original Rev. Stat. 2502 (see Lan. 3764; B. 1536-185), and that no consents of the owners of property abutting on said avenue to such extension were obtained. The plaintiff also contends that even if the defendant railway company has a franchise in Bellefontaine avenue, that it has about ten and a half years yet to run and that the council has no power to extend it until the expiration of said franchise.

Every one of the questions of law raised by this controversy has been passed on by the courts heretofore. In *State v. Railway*, 3 Circ. Dec. 471 (6 R. 318), the circuit court of the eighth circuit had before it and squarely decided the questions of law relied on by the plaintiff, and that decision was adverse to the plaintiff's contention; and the judgment of the circuit court in that case was affirmed without report by the Supreme Court of this state, January 26, 1892, in *State v. Railway*, 27 Bull. 64. The section of the statutes there under consideration and the section as it stands today are identical so far as their provisions in this behalf are concerned, and while the legislature carried original Rev. Stat. 2502 (see Lan. 3764; B. 1536-185)—the one construed by *State v. Railway*, *supra*—into the new municipal code, as Sec. 30, it changed

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it so as to make it of general application throughout the state and thus removed the objections theretofore existing against it as to its constitutionality. It was not materially changed in other parts. So that the consideration given the section by the circuit court referred to, affirmed as it was by the Supreme Court, is the Supreme Court's construction of the statute as it stands today.

In the case of the *State v. Railway, supra*, it was decided as follows:

"It was not the intention of the legislature to apply the provision of Sec. 2502 of the Revised Statutes, in respect to publication of notice and competition in rates, to a renewal of the grant of a franchise to a street railway company to occupy the streets; nor is the consent of the property owners a condition precedent to the validity of such grant."

"Whenever in the opinion of the city council the public welfare would be promoted thereby, it may, by agreement with a street railway company, terminate a grant previous to its expiration, and renew the franchise for any period not in excess of the limitation fixed by statute."

The plaintiff bases his claim, that the defendant railway company has no valid franchise in Bellefontaine avenue, upon the contention that the Depot Railway Company acquired no franchise in Bellefontaine avenue and the defendant railway company, being the successor of the Depot Railway Company, acquired no other rights therein than those possessed by the Depot Company. The claim is made that the depot company acquired no right to operate over the lines of the Lima Electric Railway Company, which it was sought to give the Depot Company by the ordinance of June 13, 1892, and which provided for an extension of the Depot Company's route over the then existing lines which the Lima Electric Railway Company had a right to build and operate.

It appears from this ordinance that the said Lima Electric Railway Company consented to such extension and also that notice of the application for the extension was given for three consecutive weeks by publication in a paper of general circulation in the city of Lima, and that there were filed with the council the lawful consents of a majority of the owners of the feet front of the property abutting on the line of said proposed extension. Among other routes, on which the Depot Company's line was sought to be extended, was the following, as found in Sec. 1 of said extension ordinance, viz., "Commencing at the public square in the city of Lima, thence on Market street and Bellefontaine avenue in said city east to the fair grounds."

It was suggested in the brief of counsel for plaintiff, that, notwithstanding the recital in the ordinance mentioned, no consents and no notices were actually obtained or given. No proof, however, was adduced in support of this assertion, and, as the court will presume that the council at the time it acted upon the extension, did so according to

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law and that its acts were regular and legal, the court can only conclude that the extension was legally and regularly authorized.

While some stress was laid upon the fact that the original Depot route was but 450 feet in length, while the line as extended was about four miles, and it was earnestly contended that the extended route was in fact a new route, yet, the court cannot conclude, in the absence of any claim and proof of fraud, that the council did not consider the extension beneficial to the public and, therefore, might honestly attempt it; neither would the court be justified in finding from the fact alone that the extension was so disproportionate to the original length of route that the meat this Caesar fed upon, whereby he grew so great, must have been tainted.

But aside from any question of fraud it was not necessary, in view of the decision in *State v. Railway, supra*, and its affirmance by the Supreme Court, for the Depot Company to procure consents of abutters to the extension of its franchise to operate over the routes of the Lima Electric Railway Company which were then built and in operation; nor that notice of its application for such extension should be published and the Depot Company and the council could, by agreement, cause the former's twenty-five years franchise to expire before the end of the twenty-five years and at the expiration, so effected, renew the grant for twenty-five years, provided the Depot Company was not released from any obligation or liability imposed by the terms of the original franchise or grant.

This being so and the original franchise of the Depot Company being valid, as to which there is no question raised, the council, if it deemed an extension of the Depot Company's franchise over the routes of the Lima Electric Railway Company beneficial to the public, and the latter company consented to such extension, might, by ordinance, authorize such extension without the publication of notice or without first obtaining the consent of abutters, and it will be presumed, in view of the fact that the extension is authorized, that the council considered that the same would be beneficial to the public. If it did publish notice of the application for the extension and the consents of abutting property holders were obtained, and the presumption is, that both were done because the extension ordinance recites the fact, and nothing has been shown to the contrary, it was a work of supererogation.

The rationale of the laws and decisions in this behalf is simply this: The streets of a municipality are public highways intended for public travel in which the whole public, represented by the state and even the nation, has an interest. Ordinarily the state is the depository of power with reference to such highways. Usually the legislature confers certain powers on the municipality in which the streets are located

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This is the case in Ohio and the council, as representative of the municipality, is given the care, supervision and control of the streets in the corporation, which it must exercise, to secure the objects of the dedication for street purposes, and must exercise conformably to legal duties and limitations.

The owner of property abutting on a street has a certain interest in the street, different from that of the general public. It is largely concerned with his right of ingress and egress to and from his abutting lands. A street railway is a means to an improved use of the highway and is authorized and tolerated because it is a public convenience, without which the social and economic activities of our present day cities would be paralyzed and their growth would speedily end. Notwithstanding their necessity the legislature has considerably provided that the rights of abutters shall not be ignored and so has required that before any street can be utilized for this improved method of transportation, the property holders must be consulted. If the owners of a majority of the foot frontage consent, then the council may determine that such street shall be one which may be used for street railway purposes. If an abutter is specially damaged by the construction of the proposed railway therein he has his private remedy, but the street may thenceforth be said to be a street railway street. Having been put in this class of highways—those wherein this improved method of transportation is to be used—the council may grant to those who will agree to carry passengers over such route at the lowest rates of fare, the right to construct and operate a street railway, in such street, for a period not exceeding twenty-five years.

Advertising for bids for the privilege is required by the statute, but no advertising is required of an intention to renew the grant at its expiration; neither is it required that the property holders shall consent to the renewal. Their consent in the first instance is not as to the length of time of the grant, but to the proposition to use the street for street railway purposes, and at no other time is their consent required by the statutes as construed by the circuit and Supreme Courts, *supra*, as to the length of time of any particular grant.

Having thus consented to the use of the street for street railway purposes, and the railway being built in pursuance thereof and of a valid grant by council, the character of that street as a street railway route is fixed and it is not required that the owners of the abutting property be again or thereafter consulted as to the term of the franchise by which any particular person or persons may operate the railway therein. The council may grant the right to any person or persons, natural or artificial, for any length of time council sees fit, not exceeding twenty-five years at a time, and may renew such right whenever it ex-

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pires by lapse of time or by reason of an agreement to that effect between the proprietor of the railway and the council. Revised Statute 2501 (Lan. 3767) authorizes a renewal at expiration upon such conditions as may be considered by council conducive to the public interest and, as was held in *State v. Railway, supra*, the existing grant may be determined by agreement and a new grant made at the same time. The only limitation on the power of council in this behalf is, that the new grant shall not exceed twenty-five years and the grantee shall not thereby be released from any obligation or liability of the old grant.

The fact then that the original route of the Depot Railway Company was but 450 feet in length, is immaterial. It was an established route and it might have been extended over any other route within the city. The extension authorized was over the lines of the Lima Electric Railway Company by agreement with the latter company, which owned and operated an existing street railway over routes already established. As these routes could not legally have been established until the owners of the majority of the frontage on these routes had consented, and as it has not been shown, nor is it contended, that they did not consent to an establishment of the routes which the Lima Electric Railway Company had a right to operate over, and as the court will not presume these routes were established contrary to law, it satisfactorily appears that the abutters have consented to the operation of a street railway over the routes of the Lima Electric Railway Company, and these consents inured to the benefit of the Depot Company when it obtained the franchise to operate over the same routes. *Knorr v. Miller*, 3 Circ. Dec. 297 (5 R. 609), affirmed by Supreme Court, without report, *Knorr v. Miller*, 27 Bull. 64.

It is only when the extension contemplates the occupancy of a street where no street railway route is already established that consents of abutters must be obtained. *Broadway & Newburg St. Ry. v. Railway*, 9 Dec. Re. 25 (10 Bull. 72); *Mt. Auburn Cable Ry. v. Neare*, 54 Ohio St. 153 [42 N. E. Rep. 768].

As Bellefontaine avenue was one of the streets over which the Lima Electric Railway Company had previously been authorized to operate a double-track street railway, at the time the Depot Company's route was extended thereover, and as the defendant company succeeded to the rights of the Depot Company, it necessarily follows that the defendant railway company has a franchise to operate over Bellefontaine avenue in the city of Lima, and by a double track if desired. And from what has been said heretofore it was competent for the council and the defendant railway company by agreement, to terminate the rights of the defendant railway company so arising on said grant and to renew the same for the period of twenty-five years, if the council was of the opinion that such

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renewal would be beneficial to the public, provided that the defendant railway company was not released from any obligation or liability imposed by the old franchise or grant.

It does not appear that the renewal attempts to release the defendant company from any such obligation or liability and, as the terms of the renewed grant are more beneficial to the city than was the old grant, it may be inferred from this fact as well as the fact that the council passed the renewal ordinance, that it was satisfied that such renewal would be for the best interests of the public.

It seemed to be the contention of the plaintiff that if one of the declared purposes of the renewal grant were carried out, namely, to afford an entrance into the city of Lima to the Indiana, Columbus and Eastern Traction Company by double-tracking the defendant railway company's lines in Bellefontaine avenue, an additional burden would be imposed upon said street and the abutting property holders damaged thereby. As was before remarked if any abutting property holder is specially injured by reason of the construction of a street railway in the street abutting his property, he has his private remedy; but the solicitor cannot predicate his claim for relief upon any anticipated injury of a private character.

By the provisions of Rev. Stat. 3443-11, 3443-17 (Lan. 5543, 5547), interurban railway companies are authorized to make traffic arrangements with any street railroad company in any city or village as to the use of so much of the tracks of the latter as may be necessary or desirable to enable the former to enter or pass through such city or village, which arrangements must conform to the terms and conditions regulating street railroads in such city or village. The defendant railway company having thus the right to make a traffic arrangement with the Indiana, Columbus and Eastern for the use by the latter of the former's tracks, no question can arise in this action as to such use being an additional servitude, or greater burden than was contemplated when the defendant railway company's tracks were authorized in said Bellefontaine avenue.

The only other point relied upon by the plaintiff was, that the council could not renew a part of the grant and that consequently its action in attempting to extend the period of the defendant railway company's franchise in Bellefontaine avenue alone was *ultra vires*. The court is clearly of the opinion that there is no force in this contention. Revised Statute 2501 (Lan. 3767) clearly authorizes the renewal of the grant upon such terms as to the council may appear to be beneficial to the public.

Reasons readily suggest themselves as to why it might be desirable to extend the term of a grant with reference to a part of one route and not to another.

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Plaintiff's counsel most strenuously contended that the effect of such a holding would be practically to mortgage the future; that as the franchises of the defendant railway company would expire as to all other street railway routes in about ten and one-half years, yet, by this proposed renewal of the grant of a part of its franchise, it would leave about ten and one-half years of part of defendant company's franchise yet to run when all its other franchises had expired. This may or may not be desirable. But in the absence of fraud it is not a question for the court but one of expediency. It must be left to the patriotism and good sense of the citizens and the council of Lima to dispose of. The statutes do not forbid the proposed action and it is not for the court to substitute its judgment of the proprieties for that of the regularly constituted authorities who are clothed by statute with a discretion in this behalf.

The application for a temporary injunction will be refused.

Darby v. Norwood.

EQUITY—INJUNCTION.

[Hamilton Common Pleas, 1906.]

MARY J. DARBY V. NORWOOD (CITY) ET AL.

EFFECT OF LACHES ON RIGHT TO INJUNCTION.

After a gas company has been allowed to expend large sums of money in piping its gas to a city and laying its pipes in the city, it will not be enjoined on suit by a taxpayer from laying its pipes and appliances in the streets of that city on the grounds that the franchise from the city, under which it is operating is illegal and void; in such a suit the court will not consider the validity of the franchise.

[For other cases in point, see 5 Cyc. Dig., "Injunction," §§ 29-32.—Ed.]

[Syllabus approved by the court.]

Horstman & Horstman, for plaintiff:

F. H. Southard and Knight & Jones, for Ohio Fuel Supply Co.

O. F. Dwyer, for city of Norwood.

SPIEGEL, J.

Plaintiff, sung as a taxpayer on behalf of the city of Norwood, alleges that the council of said city on October 16, 1905, passed an ordinance, granting to its codefendant, the Ohio Fuel Supply Company, its successors and assigns, the right and privilege of laying and maintaining its pipes and appliances in the streets, alleys, avenues and public highways of said city, for the purpose of conveying and supplying natural gas for fuel and lighting and other purposes to the consumers thereof; that said ordinance was approved by the mayor of Norwood on the same day; that within thirty days thereafter the Ohio Fuel Supply Company filed its written acceptance of the provisions of said ordinance with the clerk of the city of Norwood, and that both defendants now threaten to execute and perform said provisions and enter upon the streets and public highways of Norwood for the purpose of laying and maintaining therein pipes, to furnish natural gas for fuel, lighting and heating purposes to its inhabitants.

Plaintiff alleges that said city of Norwood had no express or implied statutory authority to pass such ordinance; that said ordinance is invalid; that the passage of said ordinance and the carrying out of its provisions would be and are an abuse of the corporate powers of said city, and that the execution and performance of the contract embodied in said ordinance is in contravention of law.

Plaintiff prays that said ordinance may be declared illegal and void, and that both defendants may be perpetually enjoined from carrying out the provisions of said ordinance.

Both defendants, the city of Norwood and the Ohio Fuel Supply Company, have filed separate answers, admitting the passage of the ordinance, denying its illegality, and praying for a dismissal of plaintiff's petition.

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In addition thereto, the Ohio Fuel Supply Company answers that prior to the passage of the ordinance it had acquired natural gas producing property in this state, had drilled wells thereon which produced large quantities of natural gas, and had invested and expended therefor the sum of \$900,000.

Further, the defendant answers that between the date of the passage of said ordinance, to wit, October 16, 1905, and the bringing of this action, relying on said ordinance, it had expended in developing said property and procuring the right of way for and the laying of its pipes to the city of Norwood the sum of about \$1,500,000, and for its equipment, consisting of main and distribution pipes and other appliances for the conveyance and distribution of natural gas the additional sum of \$350,000.

Defendant further answers that during this time it laid in the city of Norwood, for distribution of said gas, about fourteen miles of pipes, said city permitting it to enter upon its streets, avenues, alleys and public highways, ordering and directing the plans where said pipes should be located and the manner of laying the same, and at no time was any intimation given by the city or anybody on its behalf that this defendant was exercising any rights without perfect and complete right and authority so to do.

Finally, the defendant answers that now to deprive it of its privilege under said ordinance would entail upon it a loss of more than \$1,000,000, and therefore prays a dismissal of the petition.

Plaintiff's reply admits that defendant incurred expense, the amount of which she does not know, in laying its main pipes in Norwood, but claims that it was incurred since the bringing of this action; as to the other expenses she has no knowledge.

A temporary restraining order was refused upon these pleadings, and on final hearing, the facts alleged in the answer were proved.

The plaintiff is a married lady, living in Avondale, but owning an unimproved lot in Norwood. She shows no injury to herself by reason of the passage of this ordinance, and this suit seems to be brought for the purpose of testing the power of a municipality to grant a natural gas franchise. Before reaching this question, however, I must determine whether the plaintiff is entitled to such an adjudication. Upon the preliminary hearing for a restraining order I found she was not, and the final hearing only confirms me in this view. Let me cite *Columbus v. Gas & Fuel Co.* 14 Dec. 261, since affirmed by the circuit court, without report, March 20, 1904, and by the Supreme Court, without report, *Columbus v. Gas Co.* 72 Ohio St. 632, wherein the city of Columbus desired to have declared null and void the franchises theretofore granted to defendant, and to enjoin it from taking any further action thereunder, as follows:

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"Another question is presented by reason of a demurrer filed to the first defense in the answer. This raises the question as to whether or not the municipality is now estopped. The doctrine of estoppel is not applied to municipalities with that vigor with which it applies to individuals, and for a good reason. A municipality only has those powers which are expressly granted it by statute and which are necessary to carry out these grants in a proper manner. People who deal with municipalities must do so at arm's length, and are presumed to know. Nevertheless a municipality may, under proper circumstances, be estopped as to anything which it had the legal right and power to do, and this doctrine is settled as being the correct and true doctrine with reference to municipalities, unless by statute that estoppel is prevented. In the case at bar it would be unnecessary for this court to decide this question, but I may say that I could conceive of no stronger set of facts which would estop the city than the ones presented here. The city has stood by silently and permitted the defendant company to fully complete and mature all its plans, to expend over a half million dollars and to be now in the very act of supplying about thirteen hundred homes with gas. It has given the bond required and taken every step necessary to perfect its rights under the statute. It would be highly inequitable to permit the plaintiff now to have any relief by injunction. It was so decided in a case involving somewhat similar equities some time ago, in the case of *Columbus v. Bohl*, 13 Dec. 569.

"The action of the plaintiff, therefore, in this case is without merit. The demurrer to the first defense is overruled and the plaintiff's action is dismissed with costs."

The facts in the aforesaid case are similar to those at bar. In both cases the company was allowed to expend its money, and months afterward the injunction suit was filed.

Possibly the best illustration of the rule that a court of equity remains passive until a case of equity is presented, is the case of *Cincinnati v. Light Co.* 9 Dec. 438 (6 N. P. 416), affirmed by the circuit court, *Pugh v. Light Co.* 10 Circ. Dec. 573 (19 R. 594), and affirmed without report by the Supreme Court, wherein the circuit court held as follows:

"A suit in equity by a city, asking the court to have a contract between it and the electric light company declared invalid and for an injunction on the ground that such contract was *ultra vires*, cannot be maintained long after such contract had been entered into and the electric light company had expended a very large amount of money in performing such contract, but the city will be left to its remedy at law."

It is proper to quote the language of the court in its decision:

"On the pleadings as thus outlined it is claimed that the plaintiff is entitled to have the said contract as to said districts forfeited and an

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injunction issued to restrain the parties from further action under it, the principal grounds being the original contract was *ultra vires*, and that the effect of the passage of said ordinance No. 237 was to put an end to said contract.

"In considering both of these questions it must in the first place be borne in mind that the plaintiff has come into a court of equity asking equity. The equity asked here is the extraordinary relief by injunction and a forfeiture of a contract. An injunction can only issue upon the clearest showing of right, and when there is no adequate remedy at law, and a court of equity is certainly a very poor place to come to ask for a forfeiture of a contract, for a court of equity never enforces a penalty or a forfeiture. 2 Story, Equity Sec. 1319.

"The requirements exacted of one who comes into a court of equity are well known and plain and simple. A homely but expressive statement of one of these fundamental principles is, that one who comes into a court of equity must come with clean hands.

"In the case of Wm. M. Ampt, a taxpayer on behalf of the city, versus this company, wherein it was sought to enjoin the carrying out of this contract between said city and said company, and wherein it was shown that said action had not been brought until long after said contract had been made, and the defendant relying thereon had in good faith gone on and expended an immense sum of money in erecting a plant and appliances to carry out said contract, and had entered upon the performance of the same, and it was not shown but what the contract was a just and fair one and beneficial to the city, we were of the opinion that it did not present a case for equitable interference, and whether the contract was *ultra vires* or not was wholly immaterial, and we would not consider it, but would leave the parties to their remedy at law, for the conduct of the plaintiff in not asserting its rights before the large expenditures have been made, was such as to preclude him from asking equity. So at the present time, at a still later date, we must hold as we did hitherto that we will not consider whether the contract is *ultra vires* or not. Plaintiff's conduct is such as not to entitle it to any equitable relief on this ground even if the contract is *ultra vires*, for it has not done equity."

The case of *State v. Bader*, 3 Dec. 99 (1 N. P. 394), tried by me as county solicitor, is also in point. Therein Mr. Alter tried to enjoin the improvement of Indian Hill avenue under an unconstitutional enactment, but the common pleas, circuit and Supreme Courts held him estopped, because the suit was brought after the taxes had been collected and were in the county treasury, ready to pay for the improvement about to be made.

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But further citations are unnecessary. While I have made an examination of the principal question involved, having reached the conclusion stated as to plaintiff's rights, a decision upon the city's power to enter into such a contract, would only be an *obiter dictum*.

Petition dismissed.

APPEAL BONDS—BANKRUPTCY—JUDGMENTS.

[Cuyahoga Common Pleas, December, 1906.]

D. T. MERRITT ET AL. V. T. W. PRITCHARD.

1. JUDGMENT FINAL DETERMINATION OF A DUTY OR LIABILITY.

A judgment is a final determination of the rights of the parties in action. It affirms that a legal duty or liability does or does not exist and cannot be granted for any other purpose.

[For other cases in point, see 5 Cyc. Dig., "Judgments and Decrees," §§ 3351.—Ed.]

2. SPECIAL OR QUALIFIED JUDGMENT UNKNOWN IN OHIO.

Special or qualified judgments, for a particular purpose, are unknown in Ohio.

3. DISCHARGE IN BANKRUPTCY BARS FURTHER JUDGMENT—RELEASES SURETY ON APPEAL BOND.

A discharge in bankruptcy, properly plead by a defendant, is an absolute bar to judgment against him, and therefore to a right of action on an appeal bond, where judgment is a condition precedent.

[For other cases in point, see 1 Cyc. Dig., "Bankruptcy," §§ 327-353.—Ed.]
[Syllabus by the court.]

L. J. Grossman, for plaintiffs.

R. H. Lee, for defendant.

KEELER, J.

On February 11, 1904, the firm of Merritt, Elliott & Co. obtained a judgment in a justice's court against T. W. Pritchard.

On February 17, 1904, the defendant gave an appeal bond signed by one Chas. F. Greenhalgh, who, among other things in said bond, agreed and promised that "if judgment be adjudged against the defendant on the appeal" he would satisfy the same, and he also undertook that the defendant would prosecute his appeal to effect. The appeal was perfected on March 9, and on June 4, 1904, the plaintiffs filed their petition asking for judgment. On August 24, 1904, the defendant filed his answer stating, among other things, that on March 12, 1904, he filed his petition in bankruptcy in the district court of the United States for the northern district of Ohio, complying therein with all the requirements of the national bankruptcy act of congress; that on the same date he was adjudged a bankrupt and that on May 21, 1904, he received from said court a discharge from all debts and claims, which were made payable by said act against his estate, and which existed on the said

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March 12, 1904, the day on which the petition for adjudication was filed by him. He says further that the claim of the plaintiff was provable against his estate in bankruptcy, and was owing to the plaintiff before he filed his petition and was declared a bankrupt, and that said claim was scheduled in time for proof and allowance, and that he was discharged from it.

The plaintiffs, replying, say that the discharge from the obligation sued on does not have the effect of releasing the surety on the appeal bond, and that they are entitled to judgment, in spite of his discharge in bankruptcy, so that they can proceed against the surety, who was in no way released from liability to plaintiffs on the bond by reason of his discharge.

Two questions are presented by the pleadings:

First. Can a judgment be taken in this court against the defendant, he having been discharged from the debt in question by the proceedings in bankruptcy?

Second. Is the surety liable to plaintiffs, notwithstanding the discharge of the defendant?

The sole and only purpose of the judgment sought is to enable the plaintiffs to proceed against the appeal bond.

What is a judgment and what are its consequences? It is the determination of the law pronounced by a competent court, as the result of an action instituted in such court, affirming that, in the matters submitted for its decision, a legal duty or liability does or does not exist—a final determination of the rights of the parties in action. A judgment against the defendant would confer upon the plaintiffs the right to issue execution for its enforcement. There would be an indisputable obligation on the part of the defendant to the plaintiffs, subject to the processes of the court. It would create a lien upon any real estate he might own which would follow the land into the hands of other purchasers and which might be enforced by the seizure and sale of the property subjected to it. It would, furthermore, constitute a vested right of property in the plaintiffs, and it might establish either an evidence or a source of title. These are some of the consequences that would flow out of a judgment against the defendant. They are serious and should not be fastened upon him without the clearest legal right. The defendant owes nothing to the plaintiffs. That is virtually conceded, and the court would be obliged, therefore, to find for the defendant, in the absence of a confession of judgment. That would, of course, end the matter, and plaintiffs would be estopped from proceeding further, unless a judgment could be entered for a purpose other than to determine whether a legal liability does or does not exist. I know of no statute or rule of procedure in Ohio that permits it. The court could not enter a judgment and then excuse itself for doing so by saying the real object

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was to hold somebody else. That, it seems to me, would be to make a farce of the law.

On this proposition, however, plaintiffs refer to *Hill v. Harding*, 130 U. S. 699 [9 Sup. Ct. Rep. 725; 32 L. Ed. 1083], and say that such a judgment can be entered with a perpetual stay of execution as to the defendant for the purpose only of reaching the surety. That was an Illinois case, and first reading of the syllabus would seem to be convincing that plaintiffs' contention is right. But the facts there (*Hill v. Harding*, 116 Ill. 92 [4 N. E. Rep. 361]) were not at all like those here. A verdict was entered April 12, to which a motion for a new trial was filed. On April 22 the defendant filed his petition, in bankruptcy, and on May 1 he was adjudged a bankrupt. On May 7 he filed his certificate in the state court, and asked for a stay of the formal entering of judgment on the verdict because he was a bankrupt. The motion was overruled, and appeal was taken to the United States Supreme Court. Verdict had been returned, and the court in entering judgment was not adding any new liability. His bankruptcy had not been pleaded, and was therefore not an issue before verdict. He could not plead it, for it was too late, and bankruptcy not pleaded is no bar. *Holyoke v. Adams*, 59 N. Y. 233, 239. The only remedy to be had was the one the court granted, to wit, a stay of execution for the purpose of reaching the bond.

Besides, Justice Gray in the discussion of the case, page 703, says: "Whether 'the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed,' depends not upon any provision of the bankrupt act, but upon the extent of the authority of the state court under the local law. * * * There is nothing in the bankrupt act to prevent the rendering of such a judgment."

Neither is there any specific authority given by the act that it can be done, nor can such authority be inferred from it. That it can be done in Illinois seems to be the settled practice there, under certain circumstances.

It is upon that theory, I take it, that such a judgment was entered in that case, and I am not prepared to say it could not be done in Ohio under like conditions. In Massachusetts the question seems to be settled by statute, and *Monroe v. Upton*, 50 N. Y. 593, indicates a like practice in that state. In the case at bar, however, the debt was one provable in bankruptcy. Defendant was discharged from it; the remedy to enforce its payment was destroyed, and he pleaded his discharge while still on the merits of the original action, which is an absolute bar to any judgment against him. *Talbott v. Suit*, 68 Md. 443 [13 Atl. Rep. 356]; *Payne v. Able*, 70 Ky. (7 Bush.) 344, 348 [3 Am. Rep. 316].

The second question raised by the pleadings is, therefore, settled, for if there can be no judgment, there can be no right of action against the surety, the judgment being a condition precedent. Plaintiffs in-

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sist, however, that the discharge in bankruptcy in no way relieved the surety from liability to them on the bond, and they cite *Farrell v. Finch*, 40 Ohio St. 337. One Clarkson obtained his discharge in bankruptcy while a suit against him was on appeal to the court of common pleas (as here). The court says:

"The discharge of Clarkson * * * did not release Farrell," the surety on the appeal bond, "from liability on the undertaking for appeal."

The decision is very brief, not covering over a dozen lines, and I am unable to learn the reasoning of the court. Whether the debtor plead his discharge I cannot say. I am inclined to think he did not. In that case it would be true that the discharge would not, of itself, relieve the surety. But having, as here, plead his release, the surety could not be reached.

Plaintiffs cite Sec. 16 of the national bankruptcy act (30 U. S. Stat. at L. 544, 550) as follows:

"The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Who is a bankrupt? The national act defines the word to mean "a person against whom an involuntary petition * * * has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt." He is not necessarily, as commonly understood, a person who is unable to pay his debts. Under this definition Greenhalgh was at no time a surety for a bankrupt, for the defendant was discharged May 21, 1904, and the date of the appeal bond is February 17, 1904, some three months prior. That section, therefore, does not apply to the facts here.

Moreover, Sec. 16 of the act manifestly refers to codebtors, guarantors, or sureties for the bankrupt on the same or original debt, the debt on which the release is given by the discharge. 14 Am. Bankr. Rep. 20; *Abendroth v. Van Dolsen*, 131 U. S. 66 [9 Sup. Ct. Rep. 619; 33 L. Ed. 57]; *Brandenberg, Bankruptcy* 412.

Furthermore, "The question is not," says the court in 14 Am. Bankr. Rep. 20, "whether the discharge of the defendant released the liability of the surety, but whether the discharge prevented the happening of the contingency upon which the liability of the surety was to arise. If no judgment can be rendered against the defendant because of the discharge in bankruptcy, then no liability exists on the part of the surety. The discharge of the bankrupt prevents the surety from incurring liability rather than releases him."

Says *Brandenberg*, page 415!

"The cases are numerous in which it has been held that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy

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of the person for whom the obligation is assumed, the surety will be released, for the obvious reason that the event has not happened—i. e., judgment against defendant—on which the liability of the surety was made to depend. Of this class of obligations are appeal bonds and the like.”

Also *Payne v. Able*, 70 Ky. (7 Bush.) 344, 348 [3 Am. Rep. 316].

This is, of course, in line with the well-established law of suretyship. All defenses available to the principal may, in general, be resorted to in favor of the promisor in suretyship. If the principal has been released, the surety will be released. No promise to pay the debt of another can have any force when the debt of the other is satisfied. It would be unjust to require him to pay it.

Judgment for defendant.

RES ADJUDICATA.

[Superior Court of Cincinnati, Special Term, 1906.]

UNITED STATES BOARD & PAPER CO. v. HENRY C. YEISER, ADMR., ET AL.

1. JUDGMENT AS BAR TO FURTHER SUIT BASED ON SAME FACTS OR TRANSACTIONS.

A corporation having appointed certain of its directors selling agents of its manufactured product upon a specified commission and having subsequently, in consequence of full disclosures showing unfair actions of said agents, terminated the agency and brought suit for balances alleged to be due upon the account of sales made them and prosecuted said suit to judgment, said judgment is a bar to a further suit upon the same account, based upon the facts and conditions known or substantially known when the first suit was instituted.

[For other cases in point, see 5 Cyc. Dig., “Judgments and Decrees,” §§ 962-966; 7 Cyc. Dig., “Res Adjudicata,” §§ 244-252.—Ed.]

[Syllabus by the court.]

F. M. Gorman and E. J. Dempsey, for plaintiff.

C. B. Matthews and Pogue & Pogue, for defendants.

HOSEA, J.

A brief summary of the complicated series of facts shown in evidence in this cause will sufficiently indicate the basis of this opinion.

The firm of Browne & Stuart, brokers and dealers in strawboard, binders' board, etc., were instrumental, in connection with Charles W. Bell, their sales agent, in the organization of a manufacturing corporation, for the manufacture of strawboard and kindred products, whose stockholders (excepting themselves) were consumers of such products. The inducement held out to these persons was the representation that Browne & Stuart had subscribed for one-fourth of the entire capitalization and the promise to adopt a plan of business whereby these consumers should obtain their supply of strawboard, etc., constituting the

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raw material of their manufacture, at reduced rates; the assurance of dividends to accrue from sale of the remainder of the manufacturing output to the general public at full market rates; and an agreement to carry out said plan strictly in letter and spirit in suchwise that these advantages should not be in any way impaired.

The corporation being thus organized upon the apparent disposition of a large majority of the stock at par for cash, Browne was elected president, Stuart a director, and Bell secretary and treasurer; but the nature of Bell's relation to Browne & Stuart as sales agent was not disclosed to the stockholders.

A by-law was immediately adopted, providing in substance that each stockholder might purchase at a specified reduced price and in the proportion borne by his stock to the entire capital stock of the company, preference in deliveries being given to stockholders over others.

I may say in passing, that, were the construction and meaning of this by-law here open to question, I should be inclined to hold, upon the general representations and inducements made to intending stockholders by Browne & Stuart, and in view of the fact and terms of the agency subsequently conferred upon them, that this by-law applied only to such stockholders as were consumers of the product manufactured by the company, as raw material in their own business, and did not apply to Browne & Stuart, whose sole business was selling such products to the general public for profit to themselves. It is unreasonable to suppose it was the intention to create a source and means of competition in the sales of the product of the company to the general public which would inevitably impair the means of profit which was the life blood of the company.

The company having purchased a manufacturing plant and begun production, Browne & Stuart were appointed on December 19, 1896, selling agents, with a commission of 7 per cent on gross sales, with rebate of 3 per cent for cash in ten days.

At the directors' meeting on April 26, 1897, Mr. Bell, as secretary and treasurer, made a detailed written report of the operations of the company, containing a remarkable disclosure of collusion between himself and Browne & Stuart, whereby the entire product of the manufacture (with a trifling exception) had been sold to Browne & Stuart at "stockholders prices" and by them resold to stockholders and others, and an allowance made Browne & Stuart of the 7 per cent agency commission and 3 per cent for cash whether paid or not, upon all sales.

It is also shown that with the orders given by Browne & Stuart, from time to time were shipping directions with names and addresses of ultimate purchasers, and that the goods were in fact thus shipped direct from the mill. Immediately thereafter the directors rescinded the resolution appointing Browne & Stuart selling agents, and declared war. The first gun was fired by Browne & Stuart who sued the com-

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pany on May 3, 1897, in the Hamilton county common pleas for \$25,000 damages for breach of the agency contract (which resulted in judgment for defendant October 10, 1904).

The company replied to this attack by a suit against Browne & Stuart in the superior court, filed on May 6, 1897, for a balance alleged to be due from Browne & Stuart upon the account involved in and resulting from the agency contract for the month of April, 1897,—which resulted in judgment for plaintiff April 14, 1899.

The company, also, about May, 1897, filed a bill in equity in the United States circuit court for the sixth circuit of Ohio, to cancel the stock (\$25,000) obtained by Browne & Stuart, upon the ground of fraud. In this suit it was shown that by deceptive presentation of accounts it was made to appear that Browne & Stuart had paid cash for their subscription. Whereas in fact no payment had been made, the apparent payment being a deceptive profit made by Browne & Stuart in the purchase of the mill to the amount of said subscription—the company paying a correspondingly increased amount in the purchase of the mill property above the actual selling price received by the former owners.

A survey of these and other matters thus brought to light shows a condition of affairs, well calculated to justify the interposition of a court of equity, unless indeed a bar is interposed by the acts or want of diligence of the wronged parties themselves. The claim of Browne & Stuart to reimbursement for money paid Bell on account of salary as general manager of the mill is not sustained. The proof shows that he was employed by Browne & Stuart as salesman under a contract entitling him to one-half of the profit to be derived from their agency contract. The mill was operated by a superintendent paid by the company and the testimony strongly indicates that Bell's official position in the company was and was intended to be in the interest of Browne & Stuart and was adverse to that of the company.

The defense of counterclaim for promoters' services in organizing the company rests upon no better foundation—in fact no foundation in reason or proof. This defense was made in the suit in the United States court and there adjudicated, and its decree is conclusive in this connection.

The defense of *res adjudicata* based upon the former suit in this court, presents a more difficult question.

It is undoubtedly true, and it is a salutary rule, that when corporate officers deal with the corporation for their private benefit at the expense of their trust the presumption of fairness is against them to the extent that they must be prepared to show the fairness of the transactions in every respect.

The transactions of defendants in this case do not bear the test of good faith. From the outset and in every aspect they disclose a purpose

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to so organize, arrange and conduct the business of the company as to obtain an unfair advantage at the expense of the stockholders. Part of the wrong has been remedied by the United States court; and that which remains relates solely to the sale transactions involved in the account between the parties, and part of that account was the basis of the former suit in this court and the judgment in the same is now pleaded in bar. Transactions of this character must be objected to seasonably. Equity favors diligence and requires action by those wronged, within a reasonable time after the discovery of the wrong or after knowledge of facts that put the parties upon inquiry or if the facts could be discovered by reasonable diligence. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 [23 L. Ed. 328].

In the present case the company was placed in possession of all the material facts on April 26, 1897, by the report of the secretary, whose conscience was apparently quickened by the refusal of Browne & Stuart to further divide the unfair profits evenly. The company then knew that the entire product of the mill had been absorbed by Browne & Stuart at stockholders' rates, lessened by the agency commission and cash discount, and they knew the names and addresses of the ultimate purchasers. A little figuring on the basis of the prevailing market price would have approximated the exact profit made by Browne & Stuart to which the company was entitled and more exact information was within reach.

In May immediately succeeding, and with full knowledge of all the facts given in the secretary's report, the company brought its suit in the superior court against Browne & Stuart, upon part of the agency account.

It is familiar law that a demand cannot be split up to form the basis of different suits; and the earlier suit therefore is conclusively presumed to cover the entire demand of the company upon the sales account of Browne & Stuart up to and including May, 1897.

It is urged in argument that this former suit was against Browne & Stuart as purchasers and not as agents; but if this be so, then its result is even more certainly fatal to the present action, for a party cannot be sued in two capacities separately for the same thing. But it is significant that the court, in rendering its judgment in that suit, reduced the amount of recovery by an amount about equal to the agency commissions and cash discount—from which it is to be inferred that the capacity of defendants as agents was recognized and that the judgment was rendered on this basis.

While it is regrettable that these facts force the legal conclusion that the offending parties cannot now be made to disgorge their ill-gotten gains, the conclusion seems to me none the less irresistible under the well-established rules of law. The door remained open until September, 1899, the date of the entry of judgment in said former suit.

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for suitable amendments or for the dismissal of the old and the bringing of a new suit; but the submission of that cause to trial and the entering of judgment was fatal, and I am compelled to hold the defense on this point sustained, and that said suit and judgment are a bar to the present action. It follows that the judgment here must be for defendants and it is so ordered.

EXECUTION.

[Cuyahoga Common Pleas, November 16, 1906.]

MARY MORROW, ADMX., v. WELCOME T. BLUE ET AL.

ORDER IN AID OF EXECUTION IS NOT A FINAL ORDER.

In a proceeding in aid of execution, the order of a justice to a debtor of the judgment debtor to pay his debt to the judgment creditor is not a final order upon which judgment as of course can be taken, but the action on such order must be a regular civil action in which the defendant may offer any defenses he may have.

[For other cases in point, see 4 Cyc. Dig., "Execution," §§ 551-554.—Ed.]
[Syllabus by the court.]

Alexander Martin, for plaintiff.

Bacon & Clay, for defendants:

Cited and commented upon the following authorities. Revised Statutes 6680-1 to 6680-5 (Lan. 10264 to 10268); *Deveaux v. Leslie*, 9 Circ. Dec. 480 (18 R. 482); *Carlin v. Hower*, 24 O. C. C. 153; *Duffey v. Reardon*, 70 Ohio St. 328 [71 N. E. Rep. 712]; 26 Am. & Eng. Enc. Law (2 ed.) 612; Rev. Stat. 6498 to 6505 (Lan. 10075 to 10082); *Rice v. Whitney*, 12 Ohio St. 358; *Secor v. Witter*, 39 Ohio St. 218.

BEACOM, J.

Plaintiff obtained judgment in a justice of the peace court against one Malham. Subsequently she instituted proceedings in aid of execution in a justice court and such proceedings were had that the justice found, "That there was sufficient money in possession of defendants to satisfy said judgment and costs, and ordered defendants to pay same to plaintiff, to be applied first, to payment of costs, and balance to said judgment." A civil action was then instituted in a justice court against defendants herein for enforcement of said order. Judgment was rendered in favor of defendants in that court, and the case is now pending in this court on appeal. Plaintiff in her petition sets forth substantially the facts stated above and no more, simply alleging that she obtained judgment against Malham; that she began a proceeding in aid of execution; that the justice made the finding and issued the order recited above, and prays for judgment. To this defendants demur, and say the finding and order of the justice do not alone constitute facts sufficient on which to maintain an action, but that it is necessary further to aver that, at time said order was made,

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defendants herein were actually indebted to the judgment debtor, Malham.

Proceedings in aid of execution are authorized by Rev. Stat. 6680-1 to 6680-5 (Lan. 10264-10268). Subsection 4 provides, in substance, that, if it appear that the person examined is liable for any money to the judgment debtor, the justice shall order such person to pay the same to the judgment creditor.

Is this order a final order in the nature of a judgment, or does it operate simply to attach the property to which the order relates, as does an order in garnishment. In proceedings against a garnishee it is provided in Rev. Stat. 6504 (Lan. 10081):

"If the garnishee * * * fail to comply with the order of a justice to * * * pay the money owing, * * * the plaintiff may proceed against him in an action, in his own name, as in other cases, * * * and judgment may be rendered * * * for the amount of the property * * * of the defendant in the possession of the garnishee."

The court is of opinion that the order to the garnishee is in all respects of the same character as the order to the person examined in a proceeding in aid of execution. In each case the order operates only as an attachment and is in no sense analogous to a judgment. The subsequent proceedings against the garnishee have been stated above. In the case of a proceeding in aid, Rev. Stat. 6680-5 (Lan. 10268) provides that, if the person examined fails to comply with said order, the judgment creditor may proceed against said person by civil action and judgment may be rendered in favor of the judgment creditor for what shall appear to be owing the judgment debtor by such person. An appeal shall lie from such proceeding to the court of common pleas in like manner as from other judgments."

Revised Statutes 6504 and 6680-5 (Lan. 10081 and 10268) are substantially identical. The proceeding in garnishment and that in aid of execution are both proceedings by a creditor against a third person who is indebted to the claimant's debtor. In both proceedings the justice is authorized by the statutes to make "an order," to the person who is said to be so indebted to the claimant's debtor, to pay what he has in his possession, not to the debtor but to the debtor's creditor. The two last-mentioned sections of the statutes, providing for the proceedings which may be had, after the order has been made, and after the person ordered to pay has failed to do so, are in almost the same language, and the later section was probably intended to be a copy of the earlier.

If the claim of plaintiff herein, that the order, upon the person examined, to pay the money into court, is a final order, be a tenable proposition, then it is extraordinary that the legislature did not provide for some method of enforcing this order without bringing further action.

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If that order was in fact a judgment, why was not some provision made for issuing execution to satisfy that judgment? If it were a final order, why require the plaintiff to go through the formality of bringing a civil action in order to ripen that into a judgment which was already a judgment in substance? That would seem to require the doing of a vain and purposeless thing. Moreover, if the contention of plaintiff be true that said order is a final order, then the provision that plaintiff may bring a civil action is not only authorizing him to do a purposeless thing, but more extraordinary still, it authorizes the bringing of an action against a defendant who is not permitted to make a defense.

Moreover, plaintiff herein alleges that he is entitled to a judgment for the amount which the justice in the proceeding in aid ordered paid, and if his contention that that was a final order be correct, then he is doubtless correct in his claim that such is the proper amount for which judgment should be rendered herein. But Rev. Stat. 6680-5 (Lan. 10268) provides that,

“Judgment may be rendered in favor of the judgment creditor for what shall appear to be owing the judgment debtor by such person,
* * * not exceeding the amount of such order and the costs.”

This court is unable to reconcile the claim of plaintiff with this provision. The statute plainly says that in the civil action judgment may be rendered for the plaintiff for what the defendant appears to be owing the judgment debtor. This means, in substance, that if on the trial the defendant does not appear to owe anything, then the judgment for plaintiff must be for nothing. If it appear that he owes something, then it may be for that something, but what amount that judgment shall be for must be determined in the trial of the civil action. If plaintiff's contention be true, the proceedings provided for in Rev. Stat. 6680-5 (Lan. 10268) would be useless and vain.

Plaintiff claims that the constitutional requirement that no one shall be deprived of his right to have a jury trial is not violated by his theory that Rev. Stat. 6680-4 (Lan. 10267) provides for the making of a final order by a justice, for the reason that the subsequent section provides for an appeal from the findings of the justice. I am of opinion that that provision for appeal, in the subsequent section, applies to the proceedings that are provided for in that subsequent section. The provision for appeal follows immediately the provision for the institution and prosecution of a civil action. If the provision for appeal was intended to apply to the subject-matter of Rev. Stat. 6680-4 (Lan. 10267) instead of to the subject-matter of Rev. Stat. 6680-5 (Lan. 10268), we should expect the legislature to have incorporated said provision for appeal in the former section instead of in the latter.

But it is claimed by plaintiff that the circuit court, in *Carlin v. Hower*, 24 O. C. C. 153, has passed upon this exact question. This is correct. That was the ruling in that case. That ruling has not been

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directly or expressly reversed by the Supreme Court. This court would probably follow the circuit court in that ruling, although it would do so unwillingly, were it not for the authority of a dictum of the Supreme Court in the case of *Duffey v. Reardon*, 70 Ohio St. 328. This case was decided in 1904, two years later than the rendition of the decision in the case of *Carlin v. Hower*, *supra*. In that Supreme Court case, on page 333, it is said that (omitting unnecessary words),

"As to the person * * * cited to appear and answer in such proceeding" (proceeding in aid of execution), "it appears from this section [Rev. Stat. 6680-5; Lan. 10268] that the order of the justice of the peace, is not a final order, precluding further inquiry or proceedings. The party may decline to obey the order of the justice, and in such case the judgment creditor may resort to a civil action against him, in which any proper defense may be set up by way of answer.

"Similar provisions are found in Sec. 5551 [Lan. 9080] Rev. Stat., regulating attachment and garnishee proceedings, * * * in sections 6503 and 6504 [Lan. 10080, 10081]. * * * The remedy of the garnishee in such case is to refuse to comply with the order and have his rights adjudicated in a civil action."

The Supreme Court has said herein, in substance, that the proceedings in aid of execution and the proceedings against a garnishee are, in substance, the same and that the same rules apply to both proceedings. They have further said that the order of the justice in a proceeding in aid is not a final order; that it does not preclude "further inquiry or proceedings," and that the party examined "may decline to obey the order of the justice," and further that in case he be sued by the judgment creditor "any proper defense may be set up by way of answer."

This language, it is true, is only dictum. The question involved herein was not before the Supreme Court for decision, but a case closely related thereto was before it. The court was passing upon the question whether or not such order of the justice was a final order as to the judgment debtor, and in holding that such order was final as to him, they discussed the question whether or not it was a final order as to the third person alleged to be indebted. The announced opinions of the Supreme Court are not simply the language of the judge announcing the opinion. These opinions are read and examined and discussed at a meeting of the judges, and I therefore feel warranted by this dictum in not following the decision in the case of *Carlin v. Hower*, *supra*.

Demurrer sustained. Plaintiff excepts.

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SCHOOLS AND SCHOOL DISTRICTS—INJUNCTION.

[Champaign Common Pleas, October 8, 1906.]

WAYNE TP. (BD. OF ED.) •v. J. MONROE SHAUL ET AL.

1. AUTHORITY OF COUNTY COMMISSIONERS TO EMPLOY TEACHERS.

The county commissioners are authorized to employ teachers and provide for the conduct of township schools only on failure of the township board of education to make such provision; and when such board of education has suspended school in two subdistricts and has provided transportation for the pupils of those districts to other schools, it is not a failure to make lawful provision for school in such districts and the county commissioners are without authority to interfere with the management of such schools.

[For other cases in point, see 7 Cyc. Dig., "Schools and School Districts," §§ 371, 372.—Ed.]

2. DISCRETION OF TOWNSHIP BOARD OF EDUCATION IN MANAGEMENT OF SCHOOLS.

A township board of education having exercised its judicial discretion in suspending school in certain subdistricts and changing the district boundaries and having provided transportation for the pupils of such schools to other schools, the court will not interfere with such discretion on the ground of expediency or because of popular disapproval of such action.

[For other case in point, see 7 Cyc. Dig., "Schools and School Districts," §

. 181.—Ed.]

3. REMEDY FOR INTERFERENCE WITH SCHOOLS BY COUNTY COMMISSIONERS.

When the county commissioners have wrongfully interfered with the management of the township schools by unlawfully employing teachers for certain districts, and the illegality of their acts does not appear on the face of the record of their proceedings, the remedy of the township board of education is by injunction, to restrain the teachers so employed from teaching in the schools or interfering with the control of the township board over such schools.

[Syllabus approved by the court.]

E. L. Bodey and Buroker & Zimmer, for plaintiff:

Proceedings and final orders of trustees and county commissioners may be reviewed by petition in error and reviewed only for error appearing upon the record. *Haff v. Fuller*, 45 Ohio St. 495 [15 N. E. Rep. 479]; *Lewis v. Laylin*, 46 Ohio St. 663 [23 N. E. Rep. 288]; 1 High, Injunction Sec. 578.

If it be shown contrary to what appears on the record that the board of commissioners proceeded without jurisdiction, injunction may be granted for there is no adequate remedy at law. *Anderson v. Hamilton Co. (Comrs.)* 12 Ohio St. 635; *Hays v. Jones*, 27 Ohio St. 218.

Injunction is the proper remedy. *Richland Tp. (Bd. of Ed.) v. McFadden*, 8 Dec. 57 (6 N. P. 227).

Duties imposed upon the township board of education are like those imposed upon many other public officers, either ministerial or judicial. *Place v. Taylor*, 22 Ohio St. 317.

Ministerial duties, as to the manner in which they may be performed, are determined by the statutes, Judicial duties they may per-

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form or not perform as in the judgment and discretion of the board it may seem best. That such judicial discretion of a public officer cannot be controlled by the courts is well established by abundant authority in Ohio. *Cooper v. Williams*, 4 Ohio 253 [22 Am. Dec. 745]; *Youmans v. Board of Ed.* 7 Circ. Dec. 269 (13 R. 207); *Watkins v. Hall*, 7 Circ. Dec. 434 (13 R. 255); *Walker v. Railway*, 8 Ohio 38; *Mooers v. Smedley*, 6 Johns Ch. 28; *State v. Chester Tp. (Bd. of Ed.)* 25 O. C. C. 425; *Hughes v. Board of Ed.* 13 Ohio St. 336; *Wood Co. (Comrs.) v. Pargillis*, 6 Circ. Dec. 717 (10 R. 376); *State v. Shelby Co. (Comrs.)* 36 Ohio St. 326.

In proceedings under Rev. Stat. 3969 (Lan. 6441), great strictness is required as he who would avail himself of the remedy therein provided must bring himself within letter and spirit of the law. *Duncan v. Drakeley*, 10 Ohio 45; *Bushnell v. Eaton*, Wri. 720; *Langdon v. Summers*, 10 Ohio St. 77; *Conkling v. Parker*, 10 Ohio St. 28; *Webb v. Anspach*, 3 Ohio St. 522; *White v. Woodward*, 44 Ohio St. 347 [7 N. E. Rep. 446]; *Cochran v. Hirsch*, 6 Dec. 41 (4 N. P. 34); *Hurd v. Robinson*, 11 Ohio St. 232.

The only failure as shown by the evidence was the failure of the board to employ a teacher in this subdistrict and this is, in fact, no failure in view of the action of the board formerly taken to suspend the school in this subdistrict. *State v. Board of Education*, 4 Dec. 329, 335 (3 N. P. 236).

The board of education is by statute made a legal entry and is empowered to sue. Rev. Stat. 3971 (Lan. 6450). *Pugh v. State*, 51 Ohio St. 116 [36 N. E. Rep. 783]; *Edwards v. Whims*, 15 Dec. 57.

L. D. Johnson, for defendants.

MIDDLETON, J.

This case and Board of Education of Wayne Tp. Champaign Co. Ohio, v. J. Monroe Shaul and Mabel Kauffman are substantially the same, and are submitted to the court upon the petitions of the plaintiff and a motion on behalf of the defendant to dissolve a temporary restraining order heretofore granted by the court, restraining the defendants from teaching the subdistrict school in subdistricts, numbers 2 and 12, respectively, of said township. With the exception of the name of the defendant and numbers of the subdistrict, the petitions are the same.

In the case against J. Monroe Shaul, the petition avers that on or about September 18, 1906, the defendant without any authority, legal or otherwise, and without the knowledge or consent, and against the will of the plaintiff, unlawfully and forcibly entered and took possession and assumed the control of the school house in subdistrict No. 12, in said township of Wayne, and has unlawfully assumed authority to teach school in said subdistrict; and has without any authority what-

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ever, interfered with the plaintiff in its control and supervision of said subdistrict and of the pupils therein; and has ever since the date aforesaid, unlawfully and forcibly prevented, and does still unlawfully and forcibly prevent the plaintiff from having the possession, use and control of said school house, and has ever since said date, unlawfully and without warrant of law and without any authority whatever, interfered with the plaintiff in the supervision, management and control of the school provided for the said subdistrict by this plaintiff, and for which said subdistrict this plaintiff is legally required to have and maintain a school, as the law directs. And the defendant has ever since said date unlawfully interfered with the plaintiff in the management and supervision of the pupils residing in said subdistrict, for whom this plaintiff is legally required to have and maintain a school; and threatens to and will continue the aforesaid unlawful prevention of the use and control by the plaintiff of said school house, and the having, holding and maintaining of the school by said plaintiff for said subdistrict throughout the entire school year; and threatens to and will continue the aforesaid unlawful interference with the plaintiff in the supervision, management and control of the school provided for said subdistrict by this plaintiff; and threatens to and will continue the aforesaid unlawful interference with the plaintiff in the management and supervision of the pupils residing in said subdistrict unless restrained therefrom as hereinafter prayed for. By reason whereof, a great and irreparable injury has been done, is being done, and will continue to be done the plaintiff and the patrons of said school provided for said subdistrict.

The defendant interposes the following motion:

Now comes the defendant and moves the court to dissolve and vacate the temporary order of injunction allowed, and made herein for the following reasons, to wit:

First. The petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant.

Second. The board of education of Wayne township did not authorize the bringing of this action.

Third. Because the allegations made in the petition are not true.

The third ground of the motion to dissolve is submitted to the court upon testimony; the evidence of the defendant in support of this ground of the motion being the record of the proceedings of the board of county commissioners of Champaign county of September 17, 1906, showing the employment of the defendants by the board to teach the schools in said subdistricts Nos. 2 and 12; and the evidence offered in support of the petition by the plaintiff being the record of the proceedings of the board of education of Wayne township, Champaign county, Ohio, of August 24, 1906, showing a suspension of these two

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subdistricts, Nos. 2 and 12, for one year by said board, the changing of the boundary lines of said district No. 2 by said board; and the record of the proceedings of the board of education of August 31, 1906, showing an acceptance of a contract and bond of C. W. Autram, as driver in district No. 12, and the appointment of a committee of two for conveyance in district No. 2; the record of the proceedings of the board of education of Wayne township, of September 14, 1906, showing the approval of a contract and bond of W. S. Chatfield for conveying pupils in district No. 2 to Cable and other subdistricts; and the appointment of a committee of one to arrange for the conveyance of pupils in district No. 2, not already arranged for; and the adoption of a motion by the board to retain E. L. Bodey and C. E. Buroker, attorneys, to represent the board in the legal matters then pending, or which might thereafter be brought in the matters of redistricting, centralization and suspending the schools of the township.

The record of the proceedings of the county commissioners of September 17, 1906, offered by the defendants in support of the third ground of their motion to dissolve the temporary restraining order, is as follows:

"Commissioners Journal No. 16, page 558. In Matter of the Wayne Township Schools.

"In pursuance of an adjournment from September 4, 1906, the above matter came up. The county commissioners being fully advised by evidence in the hearing before said board, are satisfied and do find that the board of education of Wayne township has failed to provide sufficient school privileges for all the youth of school age in subdistricts Nos. 2 and 12 of said township, and that said board has failed to provide for each school an equitable share of school advantages as required by law, and have failed to hire school teachers for said subdistricts Nos. 2 and 12. To the foregoing decision and finding, the said board of education of Wayne township excepts.

"Mr. D. R. Kimball moved to employ J. M. Shaul as teacher for said subdistrict No. 12 at a salary of \$43 per month as teacher, and \$2 per month for janitor services for the period of eight months or so long as he continues as teacher of said school. Motion carried on roll call by the following vote: Couchman, aye; Kimball, aye; Hodge, aye.

"Mr. Kimball moved to employ Mabel Kauffman teacher of subdistrict No. 2, Wayne township, at a salary of \$43 and \$2 janitor fees per month, for a period of eight months, or as long as she shall continue as teacher of said school. Motion carried by the following vote: Mr. Couchman, aye; Kimball, aye; Hodge, aye."

The record of the proceedings of the board of education of Wayne township of August 24, 1906, relating to the suspension of the schools in districts Nos. 2 and 12, is as follows:

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"Motion by Breedlove, seconded by Johnson, that board suspend districts Nos. 2 and 12 for one year, and convey to Cable. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no; Hardman, not present. Motion carried."

The record of the board of education of this date, referring to the changing of the boundary line of district No. 2 is as follows:

"Motion by Breedlove, seconded by Johnson, that we change the boundary line of district No. 2 as follows: * * * Motion carried."

The record of the proceedings of the board of education of August 31, 1906, relating to the acceptance of a contract of C. W. Outram for driver in district No. 12, is as follows:

"Moved by Johnson, seconded by Breedlove, that board accept contract as read, and hire C. W. Outram driver as per contract. McClellan, yes; Breedlove, yes; Madden, no; Hardman not present. Motion carried."

That relating to the acceptance of his bond is as follows:

"Motion by Johnson, seconded by Breedlove, that board accept C. W. Outram's bond as read. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no. Motion carried."

That relating to the committee of two to arrange for the conveyance of district No. 2 is as follows:

"Motion by Johnson, seconded by Breedlove, that committee of two be appointed to arrange for the conveyance of district No. 2. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no. Motion carried. Johnson and Breedlove appointed as a committee."

The record of the proceedings of the board of education of September 14, 1906, relating to the contract and bond of W. S. Chatfield for conveying pupils in district No. 2 to Cable is as follows:

"Motion by Breedlove, seconded by Johnson, that board approve and accept contract and bond of W. S. Chatfield for conveying pupils in district No. 2 to Cable. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no. Motion carried."

And that relating to the committee to make arrangements for conveyance of pupils in district No. 2, not already arranged for, is as follows:

"Motion by Johnson, seconded by Breedlove, that committee of one be appointed to make arrangements for the conveyance of pupils in district No. 2, not already arranged for. McClellan, yes; Johnson, yes; Breedlove, yes; Madden, no; Hardman not present. Motion carried."

It appears from these records that on August 24, the board suspended the schools in subdistricts Nos. 2 and 12, and that on August 31, the board accepted a contract and bond of C. W. Outram for driver

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in district No. 2, and on September 14, that the board accepted a bond and contract of W. S. Chatfield for conveying pupils in district No. 2; and also that the board attempted, at least, to change the boundary lines of district No. 2 at its meeting of August 24; and while it is not so stated specifically in the minutes of the proceedings of the board, I think it is apparent upon the face of the record that the contract of September 14, with W. S. Chatfield for conveying pupils in district No. 2, covered the territory of said subdistrict, as it stood or remained after the changing of the boundary lines of said subdistrict by the board of August 24, 1906; and that by further action of the board September 14, 1906, it was intended to provide for conveyance of the pupils residing within the original boundary line of district No. 2, and not included in the territory of the district as it stood after the change in the boundary line.

While referring to this subject of the change in the boundary line of subdistrict No. 2, or at least the attempt to change such line, by the board of education, I may say that while the record of the proceedings of the board of education does not affirmatively show that the committee, appointed by the board to arrange for the conveyance of the pupils formerly included in subdistrict No. 2, actually made such arrangement before the date of the employment of the teachers by the board of county commissioners, there is no evidence before the court to show that said committee had not made such arrangement, and in the absence of such proof, the court is of the opinion, if any presumption arises in the matter at all, the presumption is, that the committee had discharged its duty in this respect and made arrangement for the transportation of such pupils to another subdistrict school. Besides, as will more clearly appear from the opinion of the court hereinafter expressed, the failure on the part of the board of education to arrange for the transportation of these pupils would not of itself warrant the commissioners in reversing the order of the township board of education, and reinstating district Nos. 2 and 12, and employing teachers for the schools thereof; nor, in this view of the matter, can it make any difference whether the meeting of the board, at which this change was attempted, was or was not a regular meeting of such board.

With respect to this third branch of the motion to dissolve the injunction, the first questions that arise are: Had the commissioners on September 17, 1906, authority to employ a teacher for subdistricts Nos. 2 and 12? Was their employment by the said commissioners lawful? Have said teachers the lawful right to occupy the school house in said subdistricts and teach the school therein? Or, is their occupancy of such school houses and their attempt to teach the schools in said subdistricts unlawful and without authority? Does the act of the defendants, in this respect, interfere with the plaintiff, the board of education of said town-

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ship, in its lawful control and supervision of said subdistricts and of the pupils therein, and of the school provided for said subdistricts, and with the management by the plaintiff, the board of education, in the management and supervision of the pupils residing in said subdistricts?

The determination of these questions involves the correct construction of several sections of the statutes of Ohio, defining the authority and prescribing the duties of a township board of education and the county commissioners, with respect to the maintenance of the public schools in a township school district. These sections are parts of title 3 of the Revised Statutes of Ohio. The sections more directly involved, are Rev. Stat. 3921, 3922, 3969, 4007 (Lan. 6410, 6412, 6441, 6556).

Revised Statute 3921 (Lan. 6410), provides as follows:

"The division of township school districts into subdistricts as they exist at the time of the passage of this act shall continue and be recognized for the purpose of school attendance, but the board of education is authorized to increase or diminish the number or change the boundaries of the subdistricts at any regular meetings, a map designating such changes to be entered upon its records."

Revised Statute 3922 (Lan. 6412), or that part that bears upon the case at bar, provides as follows:

"The board of education * * * is authorized to suspend the schools in any or all subdistricts in the township district, but upon such suspension the board must provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in said township district, or to a public school in another district, the cost of such conveyance to be paid out of the funds of the township school district; or the board may abolish all the subdistricts providing conveyance is furnished to one or more public central schools, the expense of such conveyance to be paid out of the funds of the district."

And that part of Rev. Stat. 4007 (Lan. 6556) bearing upon the case at bar, is as follows:

"Each township board of education shall establish and maintain at least one elementary school in each subdistrict under its control, unless transportation is furnished to the pupils thereof as provided by law."

These several sections of the statute clearly authorize the Board of education to suspend the schools in its discretion in any and all of the subdistricts in the township district, and to provide for conveyance of the pupils in such district or subdistricts to other public schools; or to abolish all the subdistricts and provide conveyance to one or more central schools.

Revised Statutes 3969 (Lan. 6441), and the one under which the defendants in these cases claim the right to perform the services pro-

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vided for by the action of the board of county commissioners, is as follows:

"If the board of education in any district fail in any year to estimate and certify the levy for a contingent fund as required by this chapter, or if the amount so certified is deemed insufficient for school purposes, or if it fail to provide sufficient school privileges for all the youth of school age in the district or to provide for the continuance of any school in the district for at least seven months in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall do and perform any or all of said duties and acts, in as full a manner as the board of education is by this title authorized to do and perform the same; and the members of a board who cause such failure shall be each severally liable, in a penalty not to exceed fifty nor less than twenty-five dollars, to be recovered in a civil action in the name of the state upon complaint of any elector of the district, which sum shall be collected by the prosecuting attorney of the county, and when collected shall be paid into the treasury of the county, for the benefit of the school or schools of the district."

Had, then, the county commissioners of Champaign county, authority to employ the defendants as teachers in these two subdistricts in view of these statutes? Had the township board failed to provide sufficient school privileges for all the youth of school age in their district, or to provide for each school an equitable share of school advantages, as required by the statute? Or to bring it a little nearer the controversy in these cases, had the township board failed in either of these respects in regard to subdistricts Nos. 2 and 12?

The duties imposed upon township boards of education are like those imposed upon many other public officers—either ministerial or judicial.

In *Place v. Taylor*, 22 Ohio St. 317, 322, the Supreme Court defines the judicial duties of a public officer to be those, the manner of discharging which is left to his own judgment and concerning which he may use his own discretion, and his ministerial duties to be those concerning which he has no discretion, but which he is required to perform in a particular way. In other words, the manner of discharging his judicial duties is left to his own judgment and discretion, but he has no discretion in the discharge of a ministerial duty. With respect to such duties he must proceed in a specified manner. To illustrate in this case: fixing the tax rate, certifying same to county auditor, establishing a sufficient number of elementary schools in the township, pro-

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viding school houses for the convenience of the pupils, employing teachers, furnishing school appliances, fuel, etc., making arrangement for transporting pupils from a subdistrict suspended to another school, and the like. are ministerial acts; but changing the boundary lines of a subdistrict, abolishing subdistricts and suspending the schools therein, are judicial acts of the board. The former duties, the statute requires of it and specifies the manner in which it shall perform such duties; the latter it may do or it may not do, as in its judgment and discretion it may deem best.

That such judicial discretion of a public officer cannot be controlled by the courts, is well settled by abundant authority in Ohio, nor under the construction this court places upon the provisions of Rev. Stat. 3969 (Lan. 6441), above quoted, can this discretion be controlled by the county commissioners. The evidence in this case clearly shows that the board of education had suspended the schools in these two districts, and the action of the county commissioners in hiring teachers in these subdistricts, in effect reversed the action of the school board and reinstated the same. If the board of education, having suspended the schools in these subdistricts, had failed to furnish transportation to other schools as provided by law; that is, had failed to perform its ministerial duty, imposed upon it in this respect by the statute, then the commissioners would have had authority to provide for such transportation, but the board of education, having by its order suspended these schools and having, as the court thinks the testimony shows, made provision for the transportation of these pupils to other districts, the commissioners were not vested by the statute with authority to review and change, or in any manner interfere with the order of the board of education in this respect.

A board of education of a township, under the statute, as it now stands, is not required to provide for one primary school in every subdistrict. Prior to the amendment of Rev. Stat. 4007 (Lan. 6556), April 25, 1904, the board was required to do so. The language of the statute then being, "Each township board of education shall establish and maintain at least one elementary school in each subdistrict under its control." The amendment above referred to provides that "Each township board of education shall establish and maintain at least one elementary school in each subdistrict under its control unless transportation is furnished to the pupils thereof as provided by law."

Revised Statute 3922 (Lan. 6412) of the act that enacted the foregoing and above amendment provides:

"The board of education of any township school district is authorized to suspend the schools in any or all subdistricts in the township districts, but upon such suspension the board must provide for the

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conveyance of the pupils residing in such subdistrict or subdistricts to a public school in said township district," etc.

It is clear from these acts that the board of education of Wayne township had the right to suspend these schools and provide for transportation of the pupils to another public school in the township, and the evidence before the commissioners shows that this is what the board of education of Wayne township had done.

The question whether the board in suspending these schools, acted wisely or in accordance with the will of the patrons of the schools suspended is not before the court, and the court is not called upon to deal with this question. The board may have acted arbitrarily; it may have used bad judgment in suspending these schools, and it may have acted against the will of the people of these districts, and the court is inclined to the belief that the board did act at least contrary to the will of these people and against their protest, and that its action in this respect is open to just criticism, but this does not change the rights of the board under the statutes.

If public officials, elected by the people, in the discharge of their duties as such, fail to do the will of the people, it is the right of the people, under our elective system of government, if they choose to do so, to elect as their successors those who will.

The court's construction of Rev. Stat. 3969 (Lan. 6441) is, that when a board of education fails in any year to do any of the things enumerated therein, all of which in the opinion of the court come within the class of ministerial duties as hereinbefore defined, the board of county commissioners, upon being advised and satisfied thereof, may do and perform any and all of said duties in as full a manner as the board is authorized to do. But, even as to these acts enumerated, the court thinks that a mere difference of opinion between the commissioners and the board of education as to the manner of doing them, does not give the former the right to act for and instead of the board. The penal clause of this statute provides that the members of the board who caused such failure shall be each severally liable in a penalty not to exceed \$50 nor less than \$25. I think this throws some light on the true construction of the statute, and the intention of the legislature in enacting it. The same failure, it seems, that would give the commissioners authority to act, would subject the members of the board to the penalty.

The penal provision of the statute must be construed strictly, and it can hardly be said that the legislature meant any other than the wilful, voluntary failure on the part of the members of the board to do any of the things enumerated in the act. The statute was not intended to punish a member of the board of education for a mistaken, or lack of, judgment in the performance of any of his duties however

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unsatisfactory the result might be to the pupils or people of the township. The language of the statute is, "The members of the board who cause such failure shall suffer the penalty;" that is, the failure that shall authorize the commissioners to act in the matter but whether the court is right or not in this view of the penal provision of the statute, it is clear that before the commissioners can act in place of the board of education, the board must have failed to act in some of the particulars mentioned in the statute. The evidence before the commissioners and the evidence in support of the motion before the court, in its opinion, does not show any such failure. The only failure was the failure of the board to employ teachers in these subdistricts, Nos. 2 and 12, and this was in fact no failure in view of the action of the board formerly taken to suspend the schools in these subdistricts. It has been suggested by counsel for the defendants that the board had not provided for the transportation of that portion of the pupils of district No. 2, cut off by the changing of the boundary line of that subdistrict. So far as this is concerned, the evidence shows that a committee was appointed by the board on September 14, three days before the beginning of the schools, to provide for the transportation of these pupils, and there is no evidence to show that the committee had failed to discharge this duty. Besides, if it had so failed, the commissioners, in the opinion of the court, would then have authority only to provide for such transportation and would not, by reason of such failure, be authorized to reinstate the subdistricts or hire a teacher for the same.

I have been able to find only one Ohio case wherein a court has construed Rev. Stat. 3969 (Lan. 6441) of the statute. This case was heard by the court of common pleas of Summit county and reported in *State v. Cuyahoga Falls (Bd. of Ed.)*, 4 Dec. 329 (3 N. P. 236).

This was a suit in mandamus, and the writ was allowed to compel the board of education to issue an order for his salary in favor of a superintendent of the village schools of Cuyahoga Falls, who had been employed by the county commissioners. The board had voted for several applicants, but failed of an election by a tie vote. The court in passing upon the right to a writ of mandamus says, page 335:

"Doubtless the said board of education could have elected anybody else superintendent of the schools, without let or hindrance from anyone but the members of that board, and it is equally true that they could have determined not to elect a superintendent, or perhaps to abolish the office entirely and conduct their school simply by the employment of teachers for each school."

This opinion is in accord with the conclusion of the court in the case at bar, that the commissioners can act only in the event of the failure of the Board to act.

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I am of the opinion, therefore, that the board of county commissioners of Champaign county, under the evidence before it on September 17, was without authority to reinstate these subdistrict schools and to employ teachers therefor, and that such employment being without authority in the commissioners, the defendants are without authority to hold possession of the school houses in said subdistricts, and to teach the schools therein.

As to the first ground of the motion, that the petition does not state facts sufficient to constitute a cause of action, the court is of the opinion it is not well founded. The petition not only avers that these defendants unlawfully took possession of the school house in said subdistricts, on September 18, 1906, and assumed to control the same, but that they have unlawfully assumed authority to teach school in said subdistricts, and have interfered with the plaintiff in its control and supervision of said subdistricts, and the pupils therein, and have interfered with the plaintiff in the supervision, management and control of the schools provided for said subdistricts by the plaintiff.

If the allegations of the petition are true, and the motion, being in the nature of a demurrer to the petition, admits them to be true, the court is of the opinion they state facts sufficient to constitute a cause of action and entitle plaintiff to the relief prayed for.

In the opinion of the court the plaintiff is without adequate legal remedy. A criminal proceeding against the defendants and their arrest could not restore plaintiff to its rights, nor could a proceeding in forcible detention, suggested by counsel for defendants, which might result in restoring plaintiff to the possession of the school house, alone restore it to its right to manage and control the schools of the subdistrict. The proceedings before the commissioners were not adversary in their character. The plaintiff, the board of education, was not a party in a legal sense to such proceedings. It had no right to except to the finding and order of the commissioners, and upon such exceptions institute proceedings in error. Besides, if it had such right, it could not avail it in this matter. In this state it is well settled that the proceedings and final orders of trustees and county commissioners may be reviewed by petition in error, and reviewed only for error appearing upon the record. Many cases might be cited in support of this proposition. *Haff v. Fuller*, 45 Ohio St. 495 [15 N. E. Rep. 479]; *Lewis v. Laylin*, 46 Ohio St. 663 [23 N. E. Rep. 288], being in point.

In *Haff v. Fuller*, the court say, page 497:

"In this state, the proceedings and final orders of township trustees and county commissioners, establishing ditches and roads, and of other boards exercising similar judicial functions, may be reviewed by petition in error, and reversed for errors appearing on the record.

* * *

Board of Education v. Shaul.

"The operation of the rule is not extended, however, to cases where 'the steps are regular in form, so that the illegality does not appear on the face of the proceedings themselves.' * * * In cases of that kind, if it be shown, contrary to what appears on the record, that the board or tribunal proceeded without jurisdiction, injunctions may be granted, for there is then no adequate remedy at law."

In the case at bar the steps taken by the commissioners were regular as far as appears from their record, and the illegality complained of by the plaintiff in their proceedings does not appear on the face of the proceedings of the county commissioners, but is shown by the evidence to what appears on the record, and I am therefore of the opinion that injunction is the proper remedy.

The right to injunction in a case similar to the one at bar is upheld by the court in the case of *Richland Tp. (Bd. of Ed.) v. McFadden*, 8 Dec. 57 (6 N. P. 227).

As to the second ground of the motion, that the board of education did not authorize the bringing of this action, there is no record of the proceedings of the board that shows the board at any meeting directed this particular action to be brought, but as the action is brought by the board in the name of the board, and the testimony discloses that the controversy involves the action of the board in suspending certain schools of the township, to wit, Nos. 2 and 12, and the record of the proceedings of the board of education of September 14, at a meeting held subsequent to the suspension of the schools in these subdistricts, and subsequent to a notice served on the board that an application would be made to the county commissioners of the county to employ teachers to continue the schools in these subdistricts, show that the board retained the attorneys appearing for it in this case to represent the board in the legal matters that might thereafter be brought in relation to the suspending of the schools of the township, the court is of the opinion that if it be necessary for the board to have authorized the bringing of this action, and that such authority should appear as a matter of record in the minutes of their proceedings, such authority for the bringing of this suit appears from the action of the board, so taken on September 14.

The motion to dissolve the temporary restraining order, heretofore granted, is overruled.

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BANKS—CHECKS—INSOLVENCY—PREFERENCES—TRUSTS.

[Fairfield Common Pleas, 1906.]

CHARLES TOWSON V. CLINTON P. COLE ET AL.**RIGHT TO CLAIM PREFERENCES OUT OF CHECKS DEPOSITED ON BLANK INDORSEMENTS.**

A county treasurer who has accepted personal checks in payment of taxes which he indorses in blank and delivers to a bank and is given a certificate of deposit for the amount, no memorandum of the checks as to amount, party drawing them, or on whom drawn, being kept, the bank being insolvent at the time the deposit was made and subsequently going into the hands of a receiver, cannot follow the checks or the money collected on them as a trust fund and claim a preference over other creditors of the bank; his indorsement should have been restricted so that the checks or money collected could have been followed up and would not become a part of the general funds of the bank.

[For other cases in point, see 1 Cyc. Dig., "Banks and Banking," §§ 158-164.—Ed.]

[Syllabus approved by the court.]

ON CASE presented by cross petition of John B. Kramer, treasurer of Fairfield county, Ohio.

Lane & Lane, for Kramer:

C. W. McCleery and M. A. Daugherty, for receiver.

REEVES, J.

In this case the defendant, John B. Kramer, files his cross petition in which he avers that there was a partnership composed of Towson, Martin and Cole under the name and style of the Lancaster Bank doing a banking business in the city of Lancaster, and on July 26, 1904, such proceedings were had that Henry B. Peters was appointed receiver of said bank and took charge of the books, papers, etc., and was at the time of the filing of this cross petition engaged in administering the trust for the benefit of the creditors and for his cause of action and the foundation of his prayer for relief says that on July 8, 1904, he left with said defendant, the Lancaster Bank, for collection, various checks and drafts aggregating in amount the sum of \$5,516.33.

The court read from the cross petition the amounts left by Kramer in bank from the eighth to twenty-fifth of July inclusive, the aggregate of such sums being \$20,589.70.

He says that he kept no memorandum nor record of the various checks or drafts and that for want of such record or any other means of identification he has been unable to describe the various checks and drafts, and says that the defendant, the Lancaster bank, has kept such memorandum.

The cross petitioner, Kramer, states that at the time he made such deposits he was the treasurer of the county of Fairfield and state of Ohio and that those checks and drafts had been received by him as

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such treasurer in payment of certain taxes which the defendant, the bank, knew and that there was an agreement between him and the bank that the bank was to collect these various checks and drafts and pay over the amount collected to him. And he avers that the bank has not done so; and that he is unable to make any statement or definitely set out what amounts, if any, had been collected. He avers that this is known to the defendant, the bank, and to Peters, the receiver; he also avers that he does not know what amounts have been collected but that this is known to the bank and to the receiver.

He also avers that at the time these deposits were made the bank was insolvent and unable to properly meet its obligations and makes the averment that the defendant fraudulently received those checks, having knowledge of that fact. He again avers that neither the bank nor any of its agents or owners ever paid him any part of those various checks, nor has the receiver, Peters, although he has made demand upon the bank and the receiver, and then follows a prayer for an accounting and he avers that by reason of those acts that he is entitled to a preference over and above the general creditors.

To that cross petition there was also an amendment filed, which repeats the fact that he was the duly elected, qualified and acting treasurer of Fairfield county, Ohio; that the checks and drafts were received by him in payment of taxes and were the property of himself as such treasurer of Fairfield county and that this was well known to the bank at the time the checks and drafts were deposited.

To this cross petition an answer is filed by the bank in which they say that none of the checks and drafts mentioned were ever received by said bank for the purposes of collection by said bank; that on the contrary the cross petitioner delivered all said checks and drafts to the Lancaster bank which then and thereby became the owner of said checks and drafts and that the bank concurrently delivered to him the various certificates of deposit in the aggregate sum of \$20,589.70; that the said bank did not at any time agree to collect the said checks and drafts or any of them, for the said Kramer, but it made all such collections of such drafts and checks on its own account, and the money and proceeds which it collected thereon belonged to it and not to said Kramer, and the said proceeds and moneys so by it received, when the said checks and drafts were passed and went into the funds and moneys of said bank, or were placed to the credit of said bank, with its various correspondents in other cities than the city of Lancaster, Ohio, wherever said checks and drafts were payable; that at the commencement of this action the said Lancaster bank was indebted to the said cross petitioner, John B. Kramer, on said certificates of deposit in the sum of \$20,589.70, less the sum of \$2,100 which had been theretofore paid to said Kramer on said certificates, but the payment of said sum was

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not credited thereon; that the said Lancaster bank did not agree with said Kramer or bind itself to keep the moneys and proceeds paid to it on said checks and drafts separate and apart from its other funds and moneys and the said bank was under no obligation to do so, and the said moneys and proceeds by it received on said checks and drafts were all the time commingled with, and became part of, the moneys of said bank and the identity of the same wholly lost and destroyed, nor did the said bank ever agree or bind itself to or with the said John B. Kramer to return and deliver to him the identical money by it received on said checks and drafts.

I will not read the entire answer; it practically traverses all the material facts of this cross petition which would tend to establish on the part of this cross petitioner, Kramer, any right whatever to a preference. It will be observed that there was no dispute between these parties as to the amount of the checks and drafts received. The point of the contention is, whether they were deposited for collection or were merely deposits.

It is alleged in the answer to this cross petition that \$2,100 was paid, which I believe was denied in the reply.

Mr. Q. R. Lane. It is not admitted in the manner in which it is alleged.

The court. The testimony upon that point shows that it was not paid on those certificates at all, but that it does appear in regard to that transaction that there had been a habit between the treasurer and the auditor from time to time, of issuing what is known as refunders which were generally small items aggregating in the course of several months to considerable sums; it was the habit of the treasurer to carry these refunders along and make a settlement with the auditor and commissioner and receive one voucher for the whole business and at certain times it had been the practice of the examiners of the treasurer to treat them as cash. Some of the examiners refused to do that and, as a matter of accommodation to the parties, Mr. Kramer himself sent his own check down to the amount of \$2,100 and asked the bank to carry that for him and as a matter of accommodation the bank did that; but that transaction was on June 5 and was prior to all these certificates, so that it had no connection whatever with those certificates of deposit. The defendant, Kramer, in his cross petition, claims a preference on the fund in the hands of the receiver, and I might state that at the time the bank went into the hands of this receiver there was something like \$5,000 or \$6,000 actual money turned over to the receiver.

It appears from the testimony introduced here that there was a large amount of loan, and as I remember as far as the evidence shows that all of those loans were prior to the date of this first certificate; that is, there is no evidence tending to show that these loans were made sub-

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sequent to the issuing of this first certificate of deposit. It appears from the testimony that for some cause, by reason probably of some rumors circulating on the street, the confidence of the public in the bank was shaken and there was a run on the bank, lasting something over two days, and that the bank was paying out the money it had on hand; that they took a large amount of securities and went to the city of Columbus and withdrew from their depository whatever they had on hand, and in addition to that they took a large number of notes and other securities and deposited them in that bank to secure a loan of between \$40,000 and \$50,000. That was handed over the counter to restore confidence, but in the final wind-up when the property was turned over to the receiver the bank had somewhere between \$5,000 and \$6,000 on hand.

Now the cross petitioner asks for this relief on two grounds practically, or as I might say one ground, sustained by the further fact that he was treasurer.

First, he claims that all those checks and drafts which he deposited had been theretofore received by him and were made payable to him as treasurer of this county and had been received by him from certain individuals and corporations in payment of their taxes then due; he was at this time in the midst of the collection; in fact the winding up of the collection of the taxes, the duplicate of the June payment of 1904, it being the rule here, that although the time allowed by the statute was the twentieth of June, it has been the habit of all the county treasurers to extend the time of payment for one month and generally up to the last day of July, in the first place to prevent a rush in the last few days of collection and in the second place to give the taxpayers an opportunity to get their money and to give the farmers time to obtain the money to pay their taxes. This has been the habit of former treasurers and it was an accommodation to taxpayers, but a treasurer is not bound to receive taxes after the twentieth of June.

It has been the custom for the treasurer to receive checks in payment of taxes. This is also an accommodation for if a mistake would be made when money was paid, there would always be some trouble in making the correction. It is especially an accommodation for a taxpayer who resides out of the county. There is no law which prohibits the payment of taxes by check, but for the protection of the treasurer it is understood that if the check is not paid the taxes are not paid. Although he has the right to demand the money down, yet for his own accommodation and for the accommodation of the taxpayers this rule has been established. According to the testimony the checks of local taxpayers were payable on local banks. There are banks in the villages in this county and some of those checks were drawn on those banks. It is not supposed that the treasurer would take his horse and buggy

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and go around to those banks in the villages in this county to collect those checks but he would be supposed to collect them through the banks of Lancaster. Though many of those checks were drawn on banks in the villages of the county, the great bulk of them were payable at banks in this city.

It appears that some time prior to 1904 the treasurer of the county was also the treasurer of the city fund, and that whereas, the statute providing that the treasurer of the county could not deposit the county funds in bank, there was no prohibition against depositing the city funds in bank. Up to the time the statute was changed at the passage of the present municipal code, which took the treasuryship of the city from the county treasurer and placed the funds in the hands of another officer, these city funds had been allowed to remain in the bank and the banks, by reason of having these funds deposited, had as a matter of accommodation made those collections without any charge whatever.

It is claimed on behalf of the defendant, Kramer, that after the passage of the municipal code and the transfer of the city funds from his possession to the possession of the city treasurer he had still been in the habit of depositing those checks in this bank for collection and his attention was called to the fact that they were not now receiving anything by reason of having those funds in there for their services, and that therefore they ought not to be required to pay those checks immediately. It seems that prior to that time if a check had been drawn on the Canal Winchester bank or even a New York bank wherever it was the banks collected it without any charge and without saying anything about it. But it is claimed that was changed and the officers of the bank called his attention to that fact and stated that they ought not to be required to be out of this money while it was in process of collection. Thereupon it was understood between them that these checks when brought to the bank were to be left there for collection, and the money was not to be paid to the treasurer until it had been collected.

It is claimed on behalf of the cross petitioner that the bank agreed just as soon as it collected the money to bring it up to the treasurer. That is denied. It is claimed on the other side that the understanding was, that these checks were to be deposited there and that the money was to be collected and that the money was to remain there until the treasurer needed it. I might say that after that arrangement was made the evidence of the deposit of those checks and drafts was delivered to the treasurer.

It was the habit of the examiners of the treasury as shown by the testimony to treat those papers—call them certificates of deposit or receipts for collection—as cash: because they were in process of collection they were treated as cash. But there came a time when the

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state of Ohio began to send out examiners and it seems they refused to treat them in that way, and some of the examiners got a little more technical and they refused to treat them as cash and at last required that if they had been deposited at any time prior to that the treasurer have the money on hand.

Then it was arranged that if at any time an examination was to be had that the bank would pay over all the money they had, and if necessary advance the balance of the money to cover those checks and drafts that had not yet been collected and the collections remitted back or certified back. These were the arrangements. It practically was not denied in rebuttal, that that had been the arrangement. And it was testified that it was understood that if at any time by reason of any technical examination, although the drafts had just been put in process of collection, yet if the treasurer needed that money all he had to do was to send this receipt or certificate down to the bank and get the money. These were the arrangements as shown.

It appears as shown here by the petition that the first deposit was made on July 8 and then it run on to July 11, 12, 14, 15, and up to July 25, just the day before this bank went into the hands of a receiver.

When these deposits were made whether for collection or otherwise the treasurer received from the bank on a form used by the bank as a certificate of deposit the following:

Lancaster, Ohio, July 8, 1904.

\$5,516.

This is to certify that J. B. Kramer has deposited for collection fifty-five hundred and sixteen dollars payable to the order of himself out of the current funds of this bank on the return of this certificate properly indorsed.

Now that is the form practically of all these certificates of deposit, except that in the one dated July 8, it says John B. Kramer; it is not disputed that the word "treasurer" is omitted.

The testimony tends to show that the large bulk of these checks deposited were on banks in the city of Lancaster, the four banks of the city of Lancaster. It will be observed that in none of these certificates and attached to none of them is there any schedule of the checks deposited, that the treasurer kept no memorandum of the individual checks deposited, whom they were signed by, whom they were drawn on and what banking institution they were drawn on, or their date. The treasurer kept no memorandum whatever of the checks or drafts and he called on the officers of the bank in the nature of a disclosure to disclose to him the amounts. And it seems that after a careful examination of the interrogatories annexed to the petition and the testimony that as far as the

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efforts of the treasurer have been concerned that there has been a total failure here to trace any amount to any particular bank or individual.

It appears that these different checks were not entered on what is known as the collection record; they were not even indorsed for collection; they were just indorsed, generally: "John B. Kramer, treasurer," and handed into the bank, and although there has been an effort made and learned counsel have made every effort that human power could make, to trace and discover the names of the persons, the banks upon which they were drawn, the amounts and dates, yet there has been a total failure as far as the evidence is disclosed to do that and it appears from examination of the books that it is impossible to trace these individual deposits to any particular bank or show by whom they were drawn.

It seems that when these checks were received they were just turned over to the ordinary checks in bank and seem to have been treated just as ordinary checks coming into the bank. So that it has been impossible as far as tracing to trace any of these particular checks or the application of the funds arising from any one of those checks. It is admitted that between one-fifth and one-sixth of them were on the Lancaster bank, represented by Peters, the receiver, and that probably a proportionate amount was represented by checks or a large amount of the balance on the other three banks, and that the great bulk of the balance was represented by checks drawn on banks in this county and adjacent cities, the city of Columbus principally. And it appears that so far as the testimony is concerned that none of these funds arising from any of those checks could be traced into the hands of this receiver after his appointment. In other words it could not be shown that he received the proceeds of any of those checks after his appointment as receiver.

That is the state of facts. To these facts the court must apply the law. The rule laid down is pretty well stated in one of the authorities cited by counsel for cross petitioner in their brief.

"The beneficiary of the express trust may follow the trust, may follow the property into the trust funds in case of insolvency but in all cases he must show that the property is actually represented in the assets."

Counsel on both sides have filed elaborate and very learned briefs. The court has taken time to examine as far as it could the authorities cited. The burden of proof is upon this cross petitioner to establish that these were trust funds, that there was a trust relation between him and this bank and its officers, that he took all the precautions that a man ordinarily could to retain his funds, control of his funds, and that he was in such condition in fact.

Suppose for the purposes of the argument that this bank closed on the twenty-sixth, that he had deposited a number of checks and drafts

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that day, drawn on banks outside of this particular bank. He must have been in such position that he could identify those checks; that he could stop payment upon them. Suppose the check was on Columbus. To claim to be the owner, he must be able to stop payment, so that he could notify the bank, "You must not pay that money to the Lancaster bank; that is my money; it is a trust fund." That seems to be the weight of the authorities.

And another question has been raised on behalf of this bank and also not only the bank but a number of other creditors, the perpetual building association, which had a very large deposit, in fact the largest deposit in this bank.

It is shown in the testimony that from one-fourth to one-fifth or say to one-sixth of those checks were drawn on the Lancaster bank itself, payable at the Lancaster bank and were drawn on the Lancaster bank by depositors of funds in the Lancaster bank in payment of their taxes, and probably that proportion on the other banks in the city, so that probably from four-fifths to five-sixths of the funds here as far as the evidence discloses was payable at banks in this city.

It is argued first as to the Lancaster bank: That when these checks were taken to the Lancaster bank that the Lancaster bank undertook to collect from its own depositors that this money was held in a trust relation; that was argued with considerable ability and skill. How is that?

The rule of law is, that if a check is drawn by a depositor on a bank it is the duty of the bank immediately to pay that money. How could that fund be kept separate? Not by entering it on the books. If the bank did not hand it over, how could he say that the bank was holding it in trust for him?

Take the other banks of the city. Unless there was an agreement that the money was to be kept separate, put in an envelope and laid away by itself, it would not become the money of the cross petitioner. It is true that it is a matter of convenience to the treasurer to deposit checks in this way. These checks were not indorsed for collection. It has been testified here and it is a matter of common knowledge that these banks every day have a settlement with each other. It has been testified here and is well known to every citizen who has dealings with banks, that a cashier of one bank will call on another and find out how much each bank is indebted to the other on checks and drafts, and if there is a balance in favor of one of the banks that is settled. The bank with the least amount of checks and drafts pays over the difference.

Suppose for the purposes of the argument that John B. Kramer had gone there at the time when these cashiers were making exchanges;

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suppose he had heard the bank was in bad condition; if they were not indorsed for collection, it is a question whether he could stop their exchange unless he had an injunction. But if those checks were indorsed for collection that would be notice to the bank that it was a private account; they could not say, "Here you must take those general checks we have as against those checks here for collection."

Again: Some of these checks were deposited as early as July 8 and the bank closed July 26. Every one, as I said before, having business with the banks here, is aware of the fact that those banks make exchanges every day. The treasurer must have known that, by the afternoon of July 9 and before the bank closed, the Lancaster bank had every dollar on those checks and drafts deposited on July 8 or its equivalent in their bank.

The officers of the bank claim that there was an agreement and understanding that these deposits would remain in there and they say that the words 'for collection' were written in the certificate of deposit for the protection of the treasurer; but the court has, when it comes to apply the law that gives a preference, to be clearly satisfied that there was a preference, and that the party making it took the precautions that the law requires; he must deal with the bank strictly if he wants a preference; he cannot deposit in his own name in the general funds of the bank and when the identity of the deposit is lost claim a preference. So that in this agreement Kramer had with the bank that as soon as this money was collected it was to be turned over to him, he certainly had notice that the money was in bank, that exchanges were made every day, and that if the officers of the bank did not bring up the money, he could have sent down his certificate and got it or telephoned them to bring it up to his office.

Now in regard to these collections from foreign banks:

We all know that even if a check is sent to the city of New York, inside of three days at least, there is a remittance or some notice concerning it. This matter had been going on from July 8 to July 26. While I acknowledge the rule and would be glad to enforce the rule in this case relating to the deposit of funds in a trust capacity, these other creditors have the same right this creditor has, and he is asking for something beyond the rights of other creditors. He is asking the court to reach into this fund and take out this \$20,000 and give it to him with interest from the dates of those different deposits—at least from the date of their probable collection.

I think the law in this case is pretty well settled in this case of *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172, where nearly all those authorities which have been cited are commented upon.

The court read from above case.

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In the light of those facts the court is driven to the conclusion that the only right that this creditor has is that of a general creditor.

I want to say one thing, however, which I feel it my duty to say in view of some matters that came up and some suggestion made in argument that there might be some reflection cast upon this treasurer. I want to say this, there can be no reflection from anybody upon this treasurer. He honestly believed that by those proceedings he was depositing these moneys in a trust relation and that they were not deposited in any way so as to conflict with the statute and his duty as treasurer.

The testimony shows that this treasurer is entitled by reason of the manner in which he has conducted his office, to the gratitude and commendation of the public. He never received a cent from any of these deposits as shown by the testimony; it is a matter that he may be proud of and that this whole community may be proud of, because it is an exceptional case in this state; he has conducted his office honestly; anybody that makes any reflection upon him stultifies himself and not the treasurer. The only trouble is, he was not a bank lawyer. The intricacies of the bank law are such now that very few persons, unless they make it a special study, could make a deposit of this kind without examining recent decisions and preserve a preference and a trust; his intentions were good; he made his best efforts to preserve a preference; the trouble was, that he did not understand the necessary requirements of the law to preserve a preference in this case. He is not to be censured for that; his acts should receive the approval of the entire community for the faithful and honest manner in which he has conducted his office. Therefore in the judgment of the court this cross-petition will have to be dismissed.

MUNICIPAL CORPORATIONS.

[Franklin Common Pleas, March 13, 1906.]

COLUMBUS (CITY) ETC. v. COLUMBUS PUBLIC SERVICE CO. ET AL.

1. POWER OF MUNICIPALITY TO GRANT USE OF ITS LIGHT POLES.

A municipality has neither express nor implied power, through its board of public service, to grant away to a private company the right to use the city's poles for electric wires, such poles being considered personal property.

2. CREATION OF RIGHTS BY ESTOPPEL, ULTRA VIRES BY EXPRESS GRANT.

A public light company cannot, by estoppel, acquire the right to use light poles of a municipality for electric light wires, when the municipality had no power to expressly grant such right.

[For other cases in point, see 4 Cyc. Dig., "Estoppel," §§ 700-703.—Ed.]

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3. EXPEDIENCY OF AN ULTRA VIRES ACT NOT TO BE CONSIDERED.

When a contract to grant to a private company the use of the city's light poles is manifestly *ultra vires* on the part of the municipality, the fact that such grant would be desirable, profitable, advantageous, and good policy for the city will not be considered by the court to sustain such a grant.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 982-990.—Ed.]

[Syllabus approved by the court.]

J. M. Butler, G. S. Marshall and D. Keating, for plaintiff:

Contract void for noncompliance with mandatory law. *Kerlin Bros. Co. v. Toledo*, 11 Circ. Dec. 56 (20 R. 603); *Wellston v. Morgan*, 65 Ohio St. 219 [62 N. E. Rep. 127]; *Welker v. Potter*, 18 Ohio St. 85; *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374 [49 N. E. Rep. 335]; *Lancaster v. Miller*, 58 Ohio St. 558 [51 N. E. Rep. 52]; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 [54 N. E. Rep. 372]; *Uppington v. Oviatt*, 24 Ohio St. 232; *McCloud v. Columbus*, 54 Ohio St. 439 [44 N. E. Rep. 95].

Contract void because *ultra vires*. 15 Am. & Eng. Enc. Law (1 ed.) 1041; *Collins v. Hatch*, 18 Ohio 523 [51 Am. Dec. 465]; *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118 [12 N. E. Rep. 445]; *Cooley*, Const. Lim. 233; *Minturn v. Larue*, 64 U. S. (23 How.) 435 [16 L. Ed. 574]; *Bloom v. Xenia*, 32 Ohio St. 461; *State v. Carter*, 67 Ohio St. 422 [66 N. E. Rep. 537]; *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738].

Contract considered as a license cannot stand. *Wabash v. Defiance*, 10 O. F. D. 480 [167 U. S. 88; 17 Sup. Ct. Rep. 748; 42 L. Ed. 87]; *Wabash Ry. v. Defiance*, 52 Ohio St. 262 [40 N. E. Rep. 89].

Contract cannot be justified under granted powers as to use of streets. *Zanesville v. Telegraph & Tel. Co.* 64 Ohio St. 67 [59 N. E. Rep. 781; 52 L. R. A. 150; 83 Am. St. Rep. 725]; *Columbus v. Gas Co.* 14 Dec. 416.

Contract infringes private property rights. *Callen v. Light Co.* 66 Ohio St. 166 [64 N. E. Rep. 141; 58 L. R. A. 782].

No estoppel as a matter of law. *Smith*, Mun. Corp. Secs. 258, 660, 661; *Newbery v. Fox*, 37 Minn. 141 [33 N. W. Rep. 333; 5 Am. St. Rep. 830]; *Dillon*, Mun. Corp. Sec. 447; *Page*, Contracts Secs. 987, 1009, 1061, 1063; *Mullan v. State*, 114 Cal. 578 [46 Pac. Rep. 670; 34 L. R. A. 262]; *Dube v. Peck*, 22 R. I. 443 [48 Atl. Rep. 477]; *Wormstead v. Lynn*, 184 Mass. 425 [68 N. E. Rep. 841]; *Wellston v. Morgan*, 65 Ohio St. 219 [62 N. E. Rep. 127]; *Lancaster v. Miller*, 58 Ohio St. 558 [51 N. E. Rep. 52]; *Defiance v. Defiance (Council)*, 13-23 O. C. C. 96; *Hubbard v. Fitzsimmons*, 57 Ohio St. 436 [49 N. E. Rep. 477]; *State v. Liberty Tp. (Treas.)* 22 Ohio St. 144; *McCortle v. Bates*, 29 Ohio St. 419 [23 Am. Rep. 758]; *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456; *Smith*, Mun. Corp. Secs. 259, 260, 279, 280.

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Sater & Sater, T. H. Clark and J. K. Henry, for defendants.

DILLON, J.

This action is brought against the Columbus Public Service Company, a corporation organized for the purpose of furnishing electric light and water heating to patrons in the city, and also against the board of public service of the city. The object is to enjoin the use by the said electric light company of certain of the city's poles on which they have strung their wires, and also asks for a mandatory order of the court to compel the removal of such contracts as have already been made. The answers plead the provisions in two of the franchises of the defendant light company authorizing such use; also a contract made by said light company with the board of public service, granting such right and privilege; further actions and conduct on the part of the city with the light company amounting in law to an estoppel, and other considerations of policy, economy and necessity.

The discussion of the court of this case will be as brief as possible, and will especially omit discussion of those fundamental and well-settled propositions of law with which it assumes all counsel in this case to be familiar, as well as to the authorities; therefore all such propositions will be omitted.

The facts establish that about the time the first franchise was granted to the predecessor of the present public service company, to wit, on July 17, 1902, the city itself had, in embryotic stage of development, the establishment of a municipal light plant, which has since been perfected and is constantly growing and in full operation. In that original franchise, and as a part thereof, it was provided "that where said city has erected poles in advance of those to be erected by said company, such poles may be used jointly by the city and said company under reasonable regulations to be adopted by the board of public works of said city." By another ordinance granted to a predecessor of the defendant light company, passed August 3, 1903, it was also provided in substance that where the city had already erected poles, such poles might be used jointly by the city and said company, under a reasonable contract to be entered into by the board of public service of said city and said company.

No contract of any kind was ever made between the city of Columbus and the said light company until August 9, 1905, which will be referred to later. In the meantime the light company from time to time, as their business developed, continued to make contracts with the city's poles in various parts of the city, and on May 17, 1904, the board of public service unanimously adopted a resolution that the said public service company (herein referred to always as light company) be notified to remove their wires from the city's poles and place them so as not to interfere with the city's wires, and to follow out the instructions of

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Superintendent Wilcox of the municipal light plant. On the same day a letter was mailed to the light company, notifying it of this resolution and asking that there would be no delay in complying therewith. Later, on June 4, 1904, the board passed another resolution, reciting that the said light company be and is hereby required to pay for the use of the city's poles already had, and to remove these wires from the poles at once, "as they were strung thereon without the knowledge and consent of this board, except a few poles on Fifth avenue."

On the same day a copy of this resolution was likewise served upon the light company. On June 6, 1904, the light company answered, expressing some surprise to receive a notice of this character, and reciting the fact that Mr. Pond, one of the members of the board, had called the writer up over the telephone and requested him to call at the board's office in relation to the use of the city's poles. This letter further recites the franchise under which they were operating, and their expectation to make an agreement by reason of certain verbal conversations previously had with individual members of the board, and reciting further a letter written February 27, in which the light company had made the proposition that it would furnish the cross arms and pay the expense of putting them on the city's poles and pay the city fifteen cents per contact each year for all wires strung on the poles. Three days later the light company sent a further communication to the board, saying:

"We desire to enter into an arrangement with your board for the joint use of poles. * * * We would be willing to pay fifteen cents per contact, the city paying this company the same—such contract to be drawn in accordance with, and subject to, the provisions contained in ordinance granting this company its franchise."

Two months prior to this last letter, to wit, on April 27, 1904, the city solicitor had rendered a written opinion to the board of public service in which he says that "under no circumstances can you legally lease the city's poles until those poles are erected," and further, "that your board can neither lease the company's poles for the city, nor lease the city's poles to the company, except with the permission and under the direction of council." Said solicitor further stated that he would permit no further contracts. On June 11, 1904, the city solicitor sent a copy of this letter to the public service company, informing it that it was the policy of the city that its poles must not be used by private lighting companies except in strict compliance with the law, and informing the said light company that an action of injunction would be begun unless it would agree to forthwith remove its wires and no longer attempt to use the city's poles.

This communication was answered on June 13, 1904, in which the light company agrees with the statement that the city's poles must

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not be used by private lighting companies except in strict compliance of law, but claiming that their use is not without a warrant of law, and expressing a willingness to comply with the request not to string wires on any additional poles "until and unless a legal contract shall be entered into by and between this company and the board of public service, and in the event that such contract cannot be entered into within a reasonable time, this company will then proceed to erect its own poles and at once remove its wires thereto."

On August 29, 1904, the board of public service adopted a resolution "that all wire-using companies having wires attached on city poles without a contract or consent of the city, be notified to remove said wires by September 15, 1904." Said resolution further provided that after such date the superintendent of the municipal plant was authorized to employ the necessary help and remove the wires. A copy of this resolution was, on the same day, sent to the defendant light company. To this communication the defendant light company, on October 14, sent a letter. After reciting some of the history of the case, it stated that they would as soon as possible, erect such poles as may be necessary to meet the requirements, and until that time it agreed to pay the city the sum of fifteen cents per contract. On May 31, 1905, the situation remaining practically unchanged, the board passed a resolution giving the defendant light company seventy-two hours from the date of the passage of the resolution, to render a statement as to what contracts they already had, and to state whether or not they would within thirty days remove all their wires, and further stating that in the event that such assurance was not given, or, if the assurance being given and it was not carried out, then at the conclusion of thirty days would, without further notice, remove the said wires from the city's poles. This resolution was also served upon said defendant light company.

In reply to this the light company, by letter, said that by reason of the absence of one of their officers they would not be able to give the information within seventy-two hours, but if the time be extended until Wednesday of next week, they would be pleased to furnish the desired information. On June 7, this information came in the shape of a letter in which, after reciting that they had occupied the city poles under a tentative and favorable agreement with the present board of public service, goes on to state that if the board desired these wires removed, it would require some time for the defendant company to erect new poles, and they asked that the board give it a reasonable time for the reconstruction of its lines, and agreeing that in the meantime they would pay fifteen cents per contact. Attached to this letter was a copy of the contracts, showing five hundred and ninety-six contacts at various points in the city. On August 9, 1905, the board of public

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service adopted a resolution reciting their many reasons for so doing, including good business policy and being for the best interests of the city, and whereby all former resolutions were rescinded, and it was resolved that this board enter into a contract with the defendant light company providing for the joint occupancy of the poles at fifteen cents per contact per year.

Some further evidence has been adduced by the secretary of the defendant company, by Mr. Pond, one of the former members of the board, by Mr. Rubrecht, a former member of the city law department, tending to show knowledge or acquiescence of the contacts which were being made, and also testimony by Mr. Butler, former city solicitor, and Mr. Immel, former director of the board of public improvements and now a member of the board of public service, denying any such favorable agreement.

From all the evidence adduced the conclusion is irresistible that so far as the claim is made that the right to maintain these pole contacts has been established and perfected, or acquired by estoppel, no such state of facts exists as will sustain it. The defendant light company was not only from the beginning charged with notice and knowledge of the law, but as a matter of fact, it has not been misled to its disadvantage or prejudice. Whatever acts it may have done were done with full knowledge of the risk which it ran and with full, actual knowledge and in full constructive notice that whatever rights it might acquire upon the city poles must come through strict legal contract. Whatever verbal conversation may have been had from time to time, and they are quite uncertain and indefinite in character, it recognized to the very last the fact that it must either acquire a legal right by contract with the city or remove its wires. I do not think counsel expect any further discussion upon this point, and it has not been forcibly urged in the briefs.

The second consideration set forth in the pleadings and also attempted to be given in the evidence, but rejected by the court, pertained to the good policy of the opposed contract. It was sought to be shown that the presence of two poles on a street where one pole would be sufficient, was a great disadvantage to the public and to the city, both practically and from an artistic standpoint. Of this fact there can be no question whatever, and this court is not prepared to state that it might not be mutually advantageous both from a financial standpoint to the city as well as to the public generally to have such a contract entered into. It must, however, be conceded by counsel that the exercise of a power by a municipality cannot be increased nor diminished by consideration on the part of the court as to the feasibility, desirability, profit, advantage and good policy thereof. The exercise of discretion lies with those officials of the city charged with that duty,

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and if the power to exercise that discretion does not exist it cannot be aided by a consideration of the advantages which might accrue therefrom. Therefore, these considerations cannot assist the defendant light company as to the exercise of this right.

The remaining question is as to whether or not the proposed contract which the board of public service is about to enter into, is lawful. This proposed contract, as shown by the resolution quoted above, was entered into after the original petition in this case was filed, and it was rightfully assumed by the defendant company that up to that point no right did exist. The issue upon this contract is, therefore, brought before this court by a supplemental petition. The claim of the city in regard to this contract is, that it is based upon two propositions: First, that the proposed grant or contract is *ultra vires* as to the corporation; second, that even if that be one of its corporate powers, compliance with the mandatory requirements of the statute has not been made. As to the question of power in the municipality, I confess that I have not been able to find among the enumerated powers granted to the municipality, either prior to, or subsequent to, October 22, 1902 (the date of the passage of the present municipal code), any statute giving express authority, nor do I find the power to be necessarily implied from any other express powers which are given. The power granted to the municipality at the time the first franchise in this case was given is found in the Bates' Statutes of 1902, digested as Rev. Stat. 3471-3 (Lan. 5600), and cognate sections under Chap. 4, title 2.

The express power, not being given to the municipalities, to grant away its pole rights or any private company desiring to use the poles, the question, therefore, remains as to whether or not it is one of the implied powers of the city. The power having been given to the city of Columbus to grant such a franchise permitting electric light companies to occupy its streets, alleys, bridges, etc., to regulate the terms and conditions thereof the inquiry arises as to whether or not one of the powers necessary to be exercised in carrying out the express power thus granted, is embraced in the right to permit a contract for the joint use of poles for that purpose by the city and the said company. In the first place, it must be conceded that the proposition is not usual and certainly not necessary, however much it might be commended. In granting this privilege to a municipal light company the corporation is in fact disposing of a valuable asset of the city. Discuss it as we may, it must be conceded that this is a personal right and privilege having a high pecuniary value. It is not mentioned as one of the things which the city may embrace in its granting of franchises generally for this purpose. It is clear from the evidence here that the right would have to be a very limited one, since the city has but one extra arm left upon its poles for such use in the future and has not de-

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veloped its plant yet to its full capacity. It is more evident that the poles are totally insufficient for the uses which the city already sees ahead of it. It would seem, therefore, that since this is not one of those rights which the city must exercise as being necessarily or clearly implied in the exercise of a power expressly granted, it is, as claimed by counsel for the city, an act *ultra vires*.

But, passing to the second proposition; that is to say, assuming this to be one of the powers which the city may exercise, how shall it be done? What safeguards and limitations have been put upon the city in thus disposing of its property? What legal requisites are necessary in order to accomplish such a proposition? It must be remembered that the provisions of this franchise merely contemplate in the one instance that such poles might be used jointly "under reasonable regulations to be adopted by the city," and in the other case, under a reasonable contract to be entered into. In accepting this franchise, therefore, the defendant light company knew that it had a further step to take before it would have such a right, and that was to make a reasonable contract with the city, and this means, of course, a contract made according to law. With the contention that these provisions in the franchises were material inducements to the acceptance of the same by the light company, and to this expenditure of money under it, I can see that the reading of the entire franchise relegates these provisions to a very small and unimportant sphere. I believe that it is shown by the evidence, indeed, that the value of all these contracts as proposed to be contracted for would only net \$90 a year, and a reading of the franchises in full show that the main purposes so overshadow this one provision, even though it be held illegal, that it could not be claimed that it was one of the material inducements. Indeed, the regulations in the franchises as to poles show that the defendant light company must have contemplated that this provision was purely tentative and might not be entered into at all. Moreover, it is not compulsory upon the city to enter into such a contract, and if the city could not agree as to what was a reasonable regulation, the contract or provision would doubtless fail for uncertainty and lack of remedy, or indefiniteness, since the court would not substitute its discretion for that of the officers of the city as to what would be a satisfactory and reasonable regulation.

To make the proposed contract, authority must be gathered from the code, and seems to be regulated under 96 O. L. 30, Secs. 23 to 27 thereof (Rev. Stat. 1536-116 to 1536-120; Lan. 3957 to 3961). It is provided by Sec. 23 that a municipal corporation shall have the power to sell or lease real estate which was not needed for municipal purpose, and the same provision expressly limits the *jus disponendi* of personal property to a sale thereof, no provision whatever being made

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whereby personal property of the corporation which is not needed for a municipal purpose can be sold, except as therein provided. From the evidence before this court, assuming that this court might pass upon the feature, it is quite evident that the municipality has need of this very personal property, but that being a matter which is probably within the discretion of the city, there is the question before this court as to whether or not this proposed privilege and right is personal property.

The right and privilege to use the city's poles by making a contact therewith by means of wires must come under one or the other head of real or personal property. A pole is not a street or part thereof, or a means of travel and communication, as that expression is used with reference to the use of streets. It is not one of the original purposes for which streets were laid out and dedicated, as has been held by our own Supreme Court. If it be a mere license to make a contact with the city's poles, as is contended, we would have the strange result, logically following, that the exercise of a mere license could easily result in the complete confiscation and use of the entire property itself. If the pole had room for thirty contacts, and these thirty contacts were given to the defendant light company, the city has totally lost from itself a piece of personal property which was erected at a cost to itself and having value. The true "personal property" is very broad, and if we grant, as it seems to me we must, that these poles are personal property, the use thereof is a granting of such property by the corporation, and this, it seems to me, follows as conclusively as if it should decide to attempt to lease one of its ladders or one of its horses. The theory of the statute is, that the city shall not enter into any such business; that if it has no use for any such personal property its duty is to sell it. To permit any other theory would permit the city to carry on such leasing business indefinitely.

It is provided by 96 O. L. 30, Sec. 25, that any personal property not needed for municipal purposes may be sold by the board or officer having supervision of the same. No attempt to sell has been made or is threatened in this case, and, therefore, discussion as to this section and as to the value of the property involved, and as to whether or not it must be advertised, need not be made. The distinguishment, therefore, between the use of the city's poles and the use of streets must, as I see this case, be the same as the leasing of personal property and the use of streets.

A number of minor points have arisen in the case and I do not think it is necessary to discuss the point that no injury can come to the city through the joint use of the poles. On the contrary I am content to say that circumstances might very often arise when the city and public generally would be greatly benefited, and that may be true

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in this case. Nor is this a question as to whether or not property owners might complain of the joint use of poles. The board of public service certainly has jurisdiction and power over the use of its own poles, and certainly has power to contract for all such purposes and uses which are necessary for it to carry out the express power granted it in maintaining this municipal light plant, but in so doing I cannot concede the doctrine to be, that they may at the same time dispose of its own personal property, which involves an entirely different question, even though in thus disposing of its personal property some advantage incidentally accrues to it in the exercise of its express power. Nor is this proposed contract a sale. If it were, the title would absolutely pass from the city. If the city, through its officers, should attempt to sell outright a part of its personal property, a question might be presented here, which, in this case, need not be discussed, but, concluding as I have, that the board of public service has attempted to enter into a contract to lease a portion of its personal property, the statutes (Secs. 23, 24 and 25) apply.

An entry may be drawn enjoining the consummation of the proposed contract and also a mandatory order will be granted as prayed for. The time for compliance with the mandatory feature of the order will be such as will be perfectly reasonable in view of the particular business of the defendant light company, and the dependence of its patrons for proper service, and, therefore, if counsel cannot agree upon what is a reasonable time, the court under all the exigencies of the case will fix it. This time will depend, of course, upon the number of contacts which have to be changed and the erection of poles, and so forth, and will be such length of time as will be reasonable under all the circumstances, and not be destructive. The appeal bond in this case will be fixed at \$500.

A suggestion was made by one of counsel for further oral argument in this case but I have felt that the briefs covered the case amply and the very urgent insistence and demand for the time of the court in the other cases is such that I have deemed it no injustice to decide the case without further oral argument.

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BIGAMY—HUSBAND AND WIFE.

[Allen Common Pleas, November 3, 1906.]

*STATE OF OHIO V. DAVID F. BATES.

1. COMMON-LAW MARRIAGE AS A BASIS OF PROSECUTION FOR BIGAMY.

A common-law marriage may be made the basis of a prosecution for bigamy.

[For other cases in point, see 1 Cyc. Dig., "Bigamy," §§ 1-6; 5 Cyc. Dig., "Marriage," §§ 50-53.—Ed.]

2. AGREEMENT TO BECOME HUSBAND AND WIFE MAY BE PRESUMED FROM CONDUCT OF PARTIES.

A man and woman living together for nearly two years, the man recognizing and introducing the woman as his wife, and the birth of a child which the man recognizes as his own child are sufficient evidence of an agreement *in praesenti* to become husband and wife, to constitute a valid common-law marriage.

[For other cases in point, see 5 Cyc. Dig., "Marriage," §§ 40-42.—Ed.]

3. WHEN IMPROPER ARGUMENT TO JURY NOT PREJUDICIAL TO ACCUSED.

In the trial of a person charged with bigamy, the state called the alleged first wife as a witness against the accused, who objected to her competency on the express ground that Rev. Stat. 7284 (Lan. 11038), renders husband and wife incompetent as witnesses *against* each other. The court sustained the objection. In argument to the jury counsel for the state commented on the ruling as a decision of the court as to the validity of the disputed marriage. The court at once instructed the jury, on motion of the accused, that the ruling of the court referred to did not establish any fact in the case and could not be considered by the jury for any purpose, and that it particularly did not in the slightest degree prove or tend to prove the disputed marriage: *Held*, this sufficiently protected the rights of the accused.

[For other cases in point, see 4 Cyc. Dig., "Error," §§ 1688-1696.—Ed.]

[Syllabus approved by the court.]

MOTION for new trial.

B. F. Welty, for plaintiff:

The old common law of England validates marriages contracted by competent parties irrespective of ecclesiastical benediction. 2 Wharton, Cr. Law Sec. 1698.

Evidence of two marriages, the former of which was voidable will sustain indictment for bigamy. *State v. Moore*, 1 Dec. Re. 171 (3 Jo. 134).

• Marriage in fact may be established by showing that the parties lived together and cohabited as husband and wife for a series of years. *Bruner v. Briggs*, 39 Ohio St. 478.

Bigamy and averments in indictment. *Wolverton v. State*, 16 Ohio 173 [47 Am. Dec. 373]; *Stanglein v. State*, 17 Ohio St. 453; *Hanley v. State*, 5 Circ. Dec. 488 (12 R. 584); *State v. Stank*, 9 Dec. Re. 8 (10 Bull. 16).

*Reversed by the circuit court.

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A common law marriage in Ohio is valid and may be made the basis for bigamy. *Swartz v. State*, 7 Circ. Dec. 43 (13 R. 62); *Carmichael v. State*, 12 Ohio St. 553; *Lawrence Ry. v. Cobb*, 35 Ohio St. 94.

A. S. Graham and Klinger & Secrest, for defendant:

MATHERS, J.

This is on a motion for a new trial. There are numerous grounds urged, none of which, in the judgment of this court, are well taken and only two of which are important enough to call for comment. One ground is the alleged misconduct of the prosecutor in calling the alleged first wife of the defendant as a witness and his subsequent reference to the ruling of the court upon the defendant's objection as to her competency. The court sustained the objection and excluded the witness. Some reference to this ruling of the court was made by the prosecutor in his argument to the jury, as sustaining the state's contention that the woman was the defendant's wife. The court, however, was explicit and particular in its instructions to the jury, at the time the statement was made, that the jury must not think or conclude that the court had determined any fact in the case, and particularly the relationship of the alleged first wife. The jury were instructed that that was one of the principal issues in the case and that whether or not she was the defendant's wife was to be determined by them from the evidence regardless of anything the court might have ruled in this behalf. They were further instructed that the court had no authority to determine any fact in issue, but that that was a matter solely within the province of the jury and that they could not lawfully conclude, from any ruling the court had made, as to whether this woman was the defendant's wife or not. The court is now of the opinion that in the face of this instruction, which was given with great care and promptness, the defendant was not prejudiced.

The main contention of the defendant on this motion, however, is, that the evidence fails to show that there was any lawful or valid marriage between the defendant and the alleged first wife; that she and the defendant were merely living together in a state of fornication; that she was not his lawful wife; that, in short, as Rev. Stat. 7020 (Lan. 10732) inhibits persons of the opposite sex from living together in a state of adultery or fornication, it was manifestly the intention of the legislature to penalize any such cohabitation, unless a marriage, under a license or after the publication of banns, was solemnized by a magistrate, clergyman or priest. In other words, that a common-law marriage cannot serve as a predicate for a conviction of bigamy in this state. This question was fully argued during the progress of the trial and the court held that a common-law marriage could be made the basis of a bigamy prosecution, reaching that conclusion not only upon reason, but upon the

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authority of several decisions in this state where, in several cases, such a marriage has been recognized, and particularly in the criminal case of *Swartz v. State*, 7 Circ. Dec. 43 (13 R. 62) and *Carmichael v. State*, 12 Ohio St. 553. *Swartz v. State*, was a bigamy case and the accused had lived with a woman for a number of years and had had two children by her, whose legitimacy was not only recognized by their jointly naming one of the children for him, but in all the other ways that a man might recognize his children as legitimate. The defendant in that case, and the woman, held each other out to the world as husband and wife; were recognized as such in society and in the church which they attended. The defendant abandoned this woman and married another under the forms of the statute. He was convicted of bigamy and the circuit court held the conviction rightful.

In the case at bar Bates and Miss Ginter lived together from December 17, 1904, until some time in July, 1906. They occupied the same room in his mother's house part of the time. He introduced her to a number of people as his wife and said to others that she was his wife; he took her to a furniture store where they looked at some furniture and ordered some for some rooms that they intended to occupy and he introduced her to the dealer as his wife and, from the language of a number of letters which he wrote to her, and which were in evidence, the conclusion might reasonably be drawn, not only that they occupied the marital relation toward one another, but that an agreement to live as husband and wife existed between them. Furthermore, she had a child by him which was delivered at the home of his mother and he procured the services of a firm of physicians for the occasion, telling them at the time he desired them to attend his wife in confinement.

On September 23, 1906, after procuring a marriage license a few days before, he was married to a Miss Miller by a minister of the Gospel. The jury were carefully and fully instructed that if they were satisfied beyond a reasonable doubt that the defendant and Miss Ginter agreed with each other that they would take each other for husband and wife, by words in the present tense, and would thenceforth occupy the relation of husband and wife during their joint lives, and this agreement was followed by cohabitation as husband and wife, they might find the defendant was legally married. They were instructed that they must look at all the evidence which had been admitted for their consideration; at the conduct of the parties in respect to this alleged contract; to any statements or admissions which might have been shown to have been made by the defendant and, in the light of this evidence, in view of the circumstances as disclosed by the evidence, they should exercise their independent judgment and determine whether or not this contract of marriage had been entered into. Presumably the jury were satisfied beyond a reasonable doubt that such a contract existed; and, there being

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no dispute as to the second marriage of the defendant, the jury found the defendant guilty.

This court believes it to be the law that if a man and a woman agree together, *in praesenti* to become husband and wife, they being competent to make such a contract, and this agreement is followed by cohabitation, they are as effectually married as if a ceremony had been performed in the presence of witnesses, after a license had been obtained or banns published. And that if thereafter the parties cohabit as husband and wife and hold themselves out as such, and the man admits he is married to the woman and treats her as his wife, and especially if he has a child by her, every consideration of law and good morals would require that he should be punished for bigamy if he afterwards marry another woman. The statutes prescribing the forms for obtaining a license or the publication of banns and the solemnization of the marriage contract, are simply a regulation of the natural right of a man and a woman to marry. The statutes do not create that right; neither do they prohibit what is called a common-law marriage, and while the court does not mean to stamp its approval upon clandestine and secret agreements, nor to say that common-law marriages are to be encouraged, yet, until the legislature expressly prohibits them, the court is of the opinion that they do serve as a predicate for a conviction of bigamy if one of the parties to such a marriage afterward marry another.

It was said by one of Ohio's most learned jurists, in a case which the Supreme Court of this state decided, that the common law was a part of the law of Ohio except where it was inconsistent with the genius of our institutions or where it had been expressly or impliedly abrogated by statute or a decision of the court.

Counsel for the defendant relied upon the existence in this state of the common law when they objected to the testimony of the defendant's alleged first wife. The statute in this state, defining the competency of witnesses in some cases, provides that husband and wife may testify in behalf of each other in criminal trials. To that extent only is the common-law rule of evidence modified in this state. The common-law rule did not permit husband or wife to testify either for or against each other, the theory of the common law being, that the personality of the wife was merged in that of the husband. This led to many injustices and the legislature finally modified it to the extent indicated. But the modification did not abrogate the rule insofar as it prohibited the testimony of husband or wife against each other; and so the court excluded the testimony of the defendant's alleged first wife. This is cited merely as an illustration of the fact that common-law rules are still in force in this state where they have not been abrogated.

The reasons for upholding a common-law marriage in a prosecution for bigamy, are just as imperative and as well grounded in considerations

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of public policy, as for upholding any other kind of a marriage and doubtless, if a man and woman had so conducted themselves as to come within the rule of a common-law marriage, considerations of public policy would forbid their denying that relationship afterwards. I fail to perceive any good reason why after such a marriage had been entered into, a prostitution of the marriage ceremony, which is involved in a second marriage while a common-law wife is alive, is not just as much bigamy as if the first marriage had been solemnized by a magistrate, minister or priest. A bigamous marriage, *ex vi termini*, means one where one of the parties already has a husband or wife living; and where a man has, to all intents and purposes, married a woman and lived with her as his wife and introduced her as such and had a child by her, I think he as fully married as if a ceremony had been performed.

The motion for a new trial will be overruled.

INSURANCE.

[Cuyahoga Common Pleas, November 8, 1906.]

MONA P. LYTLE ET AL. V. EQUITABLE INS. CO. OF IA. ET AL.

RIGHT TO ASSIGN LIFE INSURANCE POLICIES.

A man holding life insurance policies payable to his estate cannot, just before his death, his estate being insolvent, assign such policies to his wife and children so as to defeat the rights of his creditors to the proceeds of such policies.

[For other cases in point, see 5 Cyc. Dig., "Insurance," §§ 333-336.—Ed.]

[Syllabus approved by the court.]

Blandin, Rice & Ginn, for plaintiffs.

William Howell, for defendants.

BEACOM, J.

Mona P. Lytle and the other petitioners file a joint petition in which they say that they are now the owners of a promissory note; that this note was made in 1896 by one Baldinger; that it was never paid; that Baldinger took out three life insurance policies in the Equitable Insurance Company of Iowa, payable to his estate; that last July he died, leaving a widow and children who are joint defendants herein; that he was insolvent at the time he died; that shortly before his death and at a time when he was insolvent he attempted to assign these policies to his wife and children. The petitioners claim that that was a fraud upon his creditors, and they ask to have these funds coming from the policies declared the property of the estate, not for the benefit of the petitioners alone but for all creditors, and ordered payable to a

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trustee or to the administrator, or at least be decreed as belonging to the estate just as though the attempted assignment had not been made.

To this petition a demurrer is filed, and the demurrer is founded upon the theory that, inasmuch as under the statutes a decedent might have insured for the benefit of his wife, inasmuch as he might have done that directly and creditors could have made no complaint thereof, therefore what he could do directly he could do indirectly.

I think it is manifest that different courts might take different views of this proposition. I have, however, no hesitation as to what I ought to do herein. The rights of a husband to protect his family by taking out insurance for their benefit are statutory purely, and in this case they come entirely under Rev. Stat. 3628 (Lan. 5781).

Revised Statutes 3629 (Lan. 5782) does not apply. This statute, Rev. Stat. 3628 (Lan. 5781), is entitled, "Husband may insure for the benefit of wife and children." There is no question but that Baldinger might have insured directly for the benefit of his wife and children. It is, however, a settled principle of morals and of law that a man owns nothing until after his creditors are paid. All that any of us owns, in the sense of having a legal title to them, belongs primarily to our creditors. That is the law of morals and the law of the courts. So far as Rev. Stat. 3628 (Lan. 5781) gives a man a right to insure for the benefit of his wife and children, of course, he may insure. The statute ought not, however, to be extended beyond what it says, beyond its letter.

This seems to be the facts and the law of this case:

This man had insurance policies standing in his name. Last July he was insolvent. He owed people. In a financial sense his first obligation was to his creditors. A man must be just before he is generous. He owed Mona P. Lytle and others. They should be paid before he can make presents to his wife and children. He had no more dominion over these policies which he owned and which belonged to his estate and which were then a fund for the payment of creditors than he would have over money in bank or choses in action or a piece of real estate. Being insolvent, every attempt to transfer anything by way of gift, whether that thing be lands or moneys or insurance policies, was in fraud of creditors.

Demurrer overruled. Defendants except.

State v. Dolle.

DECEIT—FRAUD—SALES.

[Hamilton Common Pleas, Jan. 8, 1907.]

STATE EX REL. LOUIS A. IRETON V. CHARLES F. DOLLE.

1. ACTION FOR DECEIT MAY BE MAINTAINED AGAINST THIRD PARTY TO CONTRACT ALTHOUGH NO COLLUSION EXISTS BETWEEN HIM AND PARTY TO CONTRACT.

An action for deceit may be maintained by one of the parties to a contract against a third party, not a party to the contract, where such third party, by false representations, is responsible for a loss to the plaintiff arising out of the making of the contract; and this is true although there was no collusion between the third party and the party to the contract who profited by the third party's fraud.

2. OUTSIDER NOT ENTITLED TO INDULGENCE OF "SELLER'S PRAISE."

The owner of real estate, when undertaking himself to sell it, has the privilege of indulging in "seller's praise" even to the point of wilful falsehood; but an outsider who undertakes to bring about a sale of real estate does not have the same privilege, and when he makes a false statement about the property to induce a sale, he may be liable to the vendee in an action for deceit, notwithstanding the same misrepresentation would not render the vendor liable if he should make it—as that the vendor would not sell for less than a certain amount, when in fact the vendor was willing to take a much smaller sum.

[Syllabus by the court.]

L. A. Ireton, W. M. Schoenle and C. O. Rose, for relator.

C. F. Dolle, for defendant.

LITTLEFORD, J.

The relator in his petition alleges that an act of the general assembly of Ohio was passed April 15, 1904 (97 O. L. 131; Rev. Stat. 4875-1 *et seq.*; Lan. 8323 *et seq.*), requiring the board of county commissioners of Hamilton county, Ohio, upon a petition signed by more than 150 electors of Hamilton county, to take proceedings to buy all the toll roads within Hamilton county and maintain them as free turnpikes. The price to be paid was not to exceed the sum of \$3,000 per mile for each toll road.

The relator further says that the Columbia & New Richmond Turnpike & Bridge Company was the owner of the New Richmond pike, one of the toll roads within Hamilton county to be purchased by the board of county commissioners; that the turnpike company fixed the purchase price on its toll road at the sum of \$11,952.50, for which it was willing to sell the road to the county commissioners; that the defendant, Charles F. Dolle, well knowing the price fixed by the company, nevertheless represented to the county commissioners that the turnpike company would not sell its road at a price less than \$20,490; that the said Charles F. Dolle made this representation to the commissioners with the intent to deceive said board, that said board should be influenced thereby and should act upon the same; and that said board of county commissioners,

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believing the defendant's statement and relying upon it, purchased the road for the sum of \$20,490.

The relator further says that the defendant demanded this \$20,490 and received the same out of the county treasury of Hamilton county; that the defendant paid to the turnpike company the sum of \$11,952.50; and that the defendant withheld and still withholds from the treasurer of Hamilton county the sum of \$8,537.50, the excess above the amount for which the owner was willing to sell the toll road and which it, in fact, received for the same.

Upon these averments the relator prays judgment against the defendant, Charles F. Dolle, in the sum of \$8,537.50. To this petition the defendant has filed a general demurrer.

This is an action for deceit. In order to make out a case of this kind it must appear that the defendant has made a false representation of a material fact; that he made the same with the knowledge of its falsity; that the plaintiff was ignorant of its falsity and believed it to be true; that it was made with the intent that it should be acted upon; and that it was acted upon by the plaintiff to his damage. Bigelow, Torts Chap. 1, page 2.

According to the averments of the petition all of these elements of an action for deceit were present in the transaction set forth. It would take too much space to point this out at length, but at least one point made in the defendant's brief will be noticed. The defendant in his brief says that bad faith is not alleged in this action, and claims that this element of an action for deceit is lacking. The petition alleges that defendant made false representations to the county commissioners "with the intention to deceive said board." This is an allegation of bad faith.

In most actions for deceit practiced in sales the representation claimed to be false or fraudulent is made by the vendor himself to the vendee; while in this case it was made by a third party. In such a case does the vendee have an action against the third party?

The first case in the reports in which this question was raised is *Pasley v. Freeman*, 3 Term. 51, also found in 2 Smith's Lead. Cas. (pt. 1) 60, with extensive notes. This was a case where Freeman persuaded Pasley to sell sixteen bags of cochineal to Falch by representing that Falch was a person "safely to be trusted and given credit to." The opinions of the different members of the court are given in full. One of the judges, Grose, J., thought the declaration failed to set forth a cause of action, because on its face there was no privity of contract between plaintiff and defendant. He said that there was no precedent for such an action, and that he had not met with, in any of the reports, an action upon a false affirmation except against a party to the contract. The other judges, including Lord Kenyon, C. J., differed from

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him, and held that to maintain an action for deceit it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

The case at bar is, if anything, stronger than *Pasley v. Freeman, supra*, because here the defendant is alleged to have received the money out of which it is claimed he cheated the plaintiff, although it is not alleged that there was any collusion between him and the turnpike company. However, under *Pasley v. Freeman, supra*, which has been followed in a number of cases since, the defendant cannot escape liability on the ground that he was not a party to the contract between the turnpike company and the county commissioners.

Another question to be determined in the case is, whether or not the defendant had the legal right, in helping along a sale of real estate, to make such a false statement as is alleged in the petition—that is, that the owners of the pike would not sell under a certain figure.

The owner of property when undertaking himself to sell it has the privilege of indulging in “seller’s praise” even to the point of wilful falsity. To quote from the opinion of Hubbard, J., in *Medbury v. Watson*, 47 Mass. (6 Metc.) 246, 259 [39 Am. Dec. 726], a leading case:

“When therefore a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has an offer of so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive are not actionable.”

But the authorities all agree that a third party who undertakes to bring about a sale of real estate does not have the same privilege with regard to misrepresentations as does the owner of the property. It is stated in Grinnell, Deceit Sec. 21 that,

“A third party who makes false averments about property with the intent to defraud the vendee may be liable to him for deceit notwithstanding the fact that the same representations with the same intent would not render the vendor liable if he should make them; for instance, about the price paid by the vendor. In such a case the distinction is, that the buyer is aware of the seller’s disposition to put a high estimate on his property, but is more apt to be misled by a third party’s apparent disinterestedness or friendliness.”

The same doctrine is laid down in *Medbury v. Watson, supra*, and in *Endsley v. Johns*, 120 Ill. 469 [12 N. E. Rep. 247; 60 Am. Rep. 572].

The fact that the defendant in the case at bar became the agent of the turnpike company by ratification does not cut any figure in determining the case. When the turnpike company accepted the sum of \$11,952.50, which the defendant gave to it as the consideration money for the pike, it ratified his agency to sell the pike for that amount, but

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it did not thereby ratify the false representations alleged to have been made to the county commissioners. In this part of the transaction, therefore, the defendant came in merely as an outsider. In that character his liability must be determined.

The demurrer is overruled.

BRIDGES—CONTRACTS—COUNTIES.

[Cuyahoga Common Pleas, December 22, 1906.]

STATE EX REL. HORNER V. KING BRIDGE CO.

RIGHT TO RECOVER MONEY PAID ON BRIDGE CONTRACTS IRREGULARLY LET.

In an action by a taxpayer to recover money paid by the county to a bridge company for bridges because of irregularities in making the contracts with the company, the defense that the bridges had been erected by the company, accepted and appropriated by the commissioners and retained and used by the public is good on demurrer.

[For other cases in point, see 2 Cyc. Dig., "Bridges," §§ 78-92; "Contracts" § 3063.—Ed.]

[Syllabus approved by the court.]

Musser & Kohler, F. S. Monnett and H. C. De Ran, for plaintiff.
Kline, Tolles & Goff, for defendant.

BEACOM, J.

Plaintiff [State of Ohio ex rel. Lafayette H. Horner, a taxpayer of Summit county for and on behalf of Summit county and the taxpayers thereof] brings this action, under authority of Rev. Stat. 1277, 1278 (Lan. 2655, 2656), to recover from defendant moneys alleged to have been illegally paid it for bridges constructed by defendant in and for Summit county. Said payments are alleged to have been illegal because the certificate of the county auditor was not given at the time said contract was entered into as required by Rev. Stat. 2834-b (Lan. 4286), and for other irregularities and omissions in the making of said contract. Plaintiff seeks to recover for the county the entire amount paid for the construction of said bridges. Defendant's answer sets up three separate defenses, to the second and third of which plaintiff demurs.

The second defense alleges that said claims were presented to the county commissioners for allowance and were by said commissioners passed upon and allowed, and that the allowance thereof was entered upon the same by the county commissioners and entered of record, the same being done in good faith. The court is of opinion that this states no defense; that the allowance by the commissioners is not conclusive and does not bar the right of this court to hear the same.

The third defense alleges, in substance, that before the payments complained of had been made the said bridges had been in good faith

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furnished to Summit county and erected and placed as required by the board of county commissioners of said county; that said bridges were accepted by the county and appropriated to its use and approved of by the board of county commissioners; that ever since they have been retained by said county and have been used and enjoyed by it and by the inhabitants and taxpayers thereof as a necessary part of its public highways; that said bridges and the material thereof and the labor performed thereon by the defendants were reasonably worth the amount paid for them; and finally, that the county has never tendered back the property so received by it from the defendants.

The court is of opinion that if these averments are true, and on demurrer they are taken to be true, then the third defense is a valid defense. That the plaintiffs should receive these bridges under such circumstances as alleged in this third defense and should be permitted both to retain the bridges and to recover back the money paid for them cannot be law anywhere. Such a claim is revolting to the sense of justice of every one. This was so held by both the common pleas and the circuit courts of Sandusky county in the case of *State v. Fronizer*, 28 O. C. C. 709, and *State v. Fronizer*, 15 Dec. 613.

Plaintiffs claim that in *Vindicator Printing Co. v. State*, 68 Ohio St. 362 [67 N. E. Rep. 733], the Supreme Court has held otherwise. This court does not think so. In that case, public officers, authorized to advertise certain public matters a certain number of times, advertised many times in excess of the number authorized by law. The court held that this was unwarranted and that the money paid out therefor could be recovered. It seems manifest that that is not the case upon which the courts of Sandusky county passed; neither is it the case that is presented herein. In *Vindicator Printing Co. v. State*, *supra*, the county commissioners had made payment for that which was wholly outside of their powers to do in any way, however regular their proceedings might be. In this present case all that is claimed is, that the commissioners of Summit county, in doing that which they had full power to do, and were required to do, to wit, to keep these highways in repair, did not proceed with strict regularity. The distinction between the two things seems clear and manifest.

Demurrer to the second defense sustained; demurrer to the third defense overruled. Both parties except.

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ASSAULT—DAMAGES.

[Hamilton Common Pleas, January 8, 1907.]

C. C. MEADE v. HERMAN LILLIE.

MEASURE OF DAMAGES RECOVERABLE BY FATHER FOR ASSAULT UPON MINOR SON.

In an action by a father for an assault and battery upon his minor son, the measure of damages is the amount of pecuniary injury, present and prospective, proximately ensuing to the father as the result of the beating. Nothing is to be compensated for except loss of the son's service, and the amount spent for medical attendance, if any. Thus the death of a cow and calf is not a consequence resulting by ordinary and natural sequence from beating the boy who is leading them, and in an action by the father of the boy against the man who beat the boy, there can be no recovery for the cow and calf, which strayed away and were killed.

[For other cases in point, see 3 Cyc. Dig., "Damages," §§ 92-111; 6 Cyc. Dig., "Parent and Child," §§ 127-132.—Ed.]

[Syllabus by the court.]

P. S. Phillips, for plaintiff.

E. J. Franks and W. L. Locke, for defendant.

LITTLEFORD, J.

The amended petition alleges that the plaintiff's son and agent, while leading a cow and calf, the property of plaintiff, along a road in front of defendant's home, was assaulted and beaten by the defendant, without any fault or cause on the part of plaintiff or his agent; that, by reason of said assault, plaintiff's agent was compelled to abandon said cow and calf and to flee for safety, by reason of which the said cow and calf were allowed to stray and were afterwards killed. Plaintiff is unable to state how or by whom the cow was killed, but that by reason of the death of the cow the plaintiff was himself compelled to kill the calf.

Plaintiff says that by reason of the said negligence of the defendant, plaintiff was damaged in the sum of \$75, for which he asks judgment and for his costs.

To this petition a general demurrer was filed.

To determine the question raised, it is necessary to decide what sort of an action is set forth in the petition.

The plaintiff, from the language of the prayer of the petition, evidently regards this as an action for negligence; in fact, counsel for plaintiff has so declared in his oral argument. But the court does not agree with the learned counsel in his view. When an action is brought by a father, for a tort affecting the person of his child, it is an action for loss of service called an action *per quod servitium amisit*. The cause of action in each case is entirely different. and the measure of damages is also entirely different in each case.

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There is no occasion to undertake to state the rules which measure damages in the various cases of negligence; but in an action by a father for an assault and battery upon his minor son, the measure of damages is the amount of pecuniary injury, present and prospective, proximately ensuing to the father as the result of the beating; that is, the amount of money loss to the father during the minority of the son.

Exemplary damages are not recoverable; neither are damages for the wounded feelings of the parent. Nothing is to be compensated for except loss of the son's service, and the amount spent for nursing and medical attendance. Of course, all damages which are not the proximate result of the injury are not to be considered, and this excludes, in this case, the loss of the cow and calf; for the death of a cow and calf driven by a boy is not a consequence resulting by ordinary and natural sequence from beating the boy.

That part of the petition which refers to the death of the cow and calf should be stricken out, and it will be so ordered on motion. But otherwise the petition sets forth a cause of action for loss of service, although as no damages are averred, it is doubtful if the plaintiff can recover more than nominal damages, unless he amends his petition.

The demurrer to the petition will be overruled.

NOTICE.

[Licking Common Pleas, April Term, 1906.]

ETHA O. HENRY V. MINNIE ALICE HENRY ET AL.

SUFFICIENCY OF NOTICE BY REGISTERED LETTER.

Notice by registered letter to a mortgagee by the husband of the mortgagor who had joined in conveying part of the mortgaged premises to their child, that such conveyance had been made and the mortgaged property not so conveyed must first be exhausted to satisfy the mortgage, is sufficient notice, and the mortgagee will be liable to such child to the extent of the release given by him to the property held by the mortgagor. This is true even though the mortgagee failed to note the contents of the letter after receiving it.

[Syllabus approved by the court.]

Flory & Flory, for plaintiff.

F. M. Black and J. R. Fitzgibbon, for defendants.

SEWARD, J.

The case of Etha O. Henry, guardian of Minnie Alice Henry, v. Minnie Alice Henry et al. is submitted to the court upon the pleadings and the evidence. The question involved is raised upon the following state of facts:

Fannie Henry was the owner of certain real estate, situated on Granville street, containing several acres. She platted an addition there,

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called Fannie Henry's addition to the city of Newark. It is the old Merchant property on the corner of Tenth and Granville streets. She mortgaged this property by two separate mortgages to Harry H. Baird. Harry H. Baird took these mortgages and filed them for record, and parcels of the real estate were sold he would release the mortgage as to the purchaser, and give the purchaser a clear title. Mrs. Henry and her husband got into some trouble, and divorce proceedings were commenced and carried through until a divorce was granted upon the application of Mrs. Henry.

During the proceedings for divorce, a conveyance was made of one of these lots to a child of Fannie Henry—Minnie Alice Henry. The child was five or six years old. This deed was made under an agreement between Henry and his wife before this divorce proceeding was concluded—before the divorce was procured—putting the title to this property at the corner of Tenth and Granville streets in this child. There were quite a number of pieces of property there covered by Mr. Baird's mortgage. After this was done, Henry wrote to Mr. Baird the following letter:

“April 21, 1900.

“Mr. Harry Baird.

“Dear Sir: I hereby notify you that Fannie M. Henry has made a conveyance of the house and lot, situated on the corner of Tenth and Granville streets, in this city, to my daughter, Minnie A. Henry, and that you having a mortgage upon this piece of property and other property, I expect you to exhaust the other property to satisfy your lien before resorting to the property above mentioned.

“I give you this notice so that you will not release any of the other property covered by your lien unless the proceeds of its sale is applied as a payment upon your lien. Mr. Black, your attorney, knows about the transaction, but I thought best to notify you personally.

“Very truly yours,

“LEE HENRY.”

This letter was written in Mr. Flory's office at the dictation of Mr. Flory. It was put in an envelope by Henry—an envelope with Mr. Flory's card upon it, and was, by Mr. Henry, deposited in the post office, in the shape of a registered letter, addressed to Mr. Baird, properly stamped, and properly addressed to Harry H. Baird, Pataskala, Ohio.

Mr. Baird says he has no recollection of ever having received that letter. But he is confronted with the registry receipt, and he admits his signature to that receipt, and he admits also that he signed the registry book, but seems to have forgotten that he ever received any such a letter. The testimony is conclusive that that letter was given to him personally; whether he read it or not is another question. It certainly

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was his duty to read it, having received an important letter like that—a registered letter—it was his duty to examine it; and the sender of that letter did all he could to notify him, except to go and notify him personally. He gave him a more permanent notification than any personal notification could have been.

The property was sold, and he continues to release his mortgage to the part sold, without receiving any pay, or any part of the proceeds of the sale, until the last parcel was sold—the parcel that is deeded to Minnie Alice Henry. That has now been sold, and the proceeds are in the hands of the guardian. Baird seeks to enforce this mortgage as against that property—the last piece of property that is covered by his mortgage—after it was sold and conveyed to Minnie Alice Henry.

There is an agreed statement of facts here which the court will refer to briefly. It states,

“That on and prior to March 26, 1900, Fannie M. Henry was the owner of a large part of the real estate described in the answer and cross petition of Harry H. Baird; that she and her husband, Lee Henry, by the deed marked exhibit ‘A,’ conveyed to said Minnie A. Henry, in fee simple, the land described therein, which is now known as lot No. 4515 in Fannie M. Henry’s addition to the city of Newark; that said deed was delivered to Minnie A. Henry on its date, March 26, 1900, and placed upon record April 21, 1900; that after the execution of said deed Minnie A. Henry went into the possession of the real estate described in the deed, and from that time, through her legal guardian, has collected the rents and profits of the real estate and paid the taxes, and has made certain improvements thereon. At the time of said conveyance to the said Minnie A. Henry and up to May 12, 1900, the said Fannie M. Henry was still the owner of a large part of the real estate covered by the mortgages of the said Harry H. Baird, and described in his answer and cross petition, which part of said real estate owned by said Fannie M. Henry, and exclusive of the property so conveyed to said Minnie A. Henry was, at the time of said conveyance, and up to May 12, 1900, of a value in excess of the amount necessary to fully pay, discharge and satisfy all the notes and mortgages mentioned in the answer and cross petition of said Baird; that said Baird, after the time of said conveyance, and on and after May 12, 1900, through releases, caused to be released and discharged from the operation of his said mortgages all of said real estate covered by his said mortgages that was still owned by the said Fannie M. Henry, as aforesaid, after the execution of said deed to said Minnie A. Henry, March 26, 1900, which was of more than sufficient value to pay the amount due on his mortgages. On March 26, 1900, Minnie Henry was an infant of the age of three years.”

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Now, it is claimed by counsel for Mr. Baird that he must have had actual notice; that the receiving of the letter is not sufficient notice to him; that he must have had actual notice; that if he failed to open the letter, it is not notice to him that would cut out his right to proceed against the property that was conveyed to Minnie A. Henry. The court does not think so. The court thinks if he received this letter, it was his duty to open it, and if he failed and neglected to open it, and thereby did not receive actual notice, he is the party that is to blame for it. It is not a question of the mailing of the letter, and the presumption that arises from the mailing of a letter properly directed and stamped; or that it goes to the destination of the person to whom addressed. That is not the question. He received the letter; he receipted for it, and he is bound by the notice in that letter; and while this is considerable of a hardship to Mr. Baird, it is the duty of the court to enforce the law as the court sees it; and there will be a decree for the plaintiff

Webb v. Stasel.

BANKS AND BANKING—PRINCIPAL AND AGENT.

[Licking Common Pleas, September Term, 1906.]

GEORGE P. WEBB, RECR., v. A. A. STASEL, RECR.

1. BANK NOT LIABLE FOR UNAUTHORIZED FICTITIOUS CREDIT GIVEN BY ITS OFFICER TO HIMSELF.

The secretary of an insolvent building association, whose accounts are short who was also cashier of a bank, credited himself on the books of the bank with \$10,000 and the treasurer of the building association with a like sum on the pass book of the treasurer, but never deposited any money in the bank for these credits. This credit was drawn on to pay a dividend on the stock of the involved building association. In an action by the building association to recover the amount credited to it, it was held that the credit was not authorized by the bank which could not be bound by the acts of its officer done in furtherance of his own fraudulent designs.

[For other cases in point, see 1 Cyc. Dig., "Banks and Banking," §§ 62-70.—Ed.]

2. KNOWLEDGE OF AGENT OF HIS OWN FRAUD AGAINST PRINCIPAL NOT IMPUTED TO PRINCIPAL.

Knowledge of an agent of a fraud he himself is perpetrating upon his principal in behalf of himself and those he represents cannot be imputed to the principal, nor is the principal bound to the principal in whose behalf the mutual agent is perpetrating the fraud by acts done by such agent in furtherance of the fraud.

[Syllabus approved by the court.]

Kibler & Montgomery, for plaintiff:

Duties of officers of bank. *Morse, Banks & Banking* Secs. 169, 172, 101; *Iowa State Sav. Bank v. Black*, 91 Iowa 490 [59 N. W. Rep. 283]; *Wallace v. Bank*, 89 Tenn. 630 [15 S. W. Rep. 448; 24 Am. St. Rep. 625]; *Barth v. Koetting*, 99 Wis. 242 [75 N. W. Rep. 395].

The cashier of the bank has authority to transact the business of the bank. *Robinson v. Bank*, 44 Ohio St. 441 [8 N. E. Rep. 583; 58 Am. Rep. 829]; *Messick v. Roxbury*, 12 Dec. Re. 95 (1 Han. 190); *Conant v. Reed*, 1 Ohio St. 298; *Niblack v. Cosler*, 8 O. F. D. 621 [74 Fed. Rep. 1000]; *Niblack v. Cosler*, 10 O. F. D. 463 [80 Fed. Rep. 596; 26 C. C. A. 16; 47 U. S. App. 637]; 1 *Morse, Banks & Banking* (4 ed.) Chap. 11, Secs. 151-180; *Fishkill Sav. Inst. v. Bostwick*, 92 N. Y. 564; *Kelley v. Bank*, 22 App. Div. 202 [47 N. Y. Supp. 1041]; *Collett v. Savings Soc.* 7 Circ. Dec. 146 (13 R. 131); *Citizens Sav. Bank v. Blakesley*, 42 Ohio St. 645; *Chemical Nat. Bank v. Armstrong*, 7 O. F. D. 210 [50 Fed. Rep. 798].

The obligation of a bank to its general depositors is not that of bailee or trustee but that of debtor. *Covert v. Rhodes*, 48 Ohio St. 66 [27 N. E. Rep. 94]; *McGregor v. Loomis*, 12 Dec. Re. 602 (1 Disn. 247); *Bank v. Brewing Co.* 50 Ohio St. 151 [33 N. E. Rep. 1054; 40 Am. St. Rep. 660]; *Armstrong v. Bank*, 6 O. F. D. 509 [133 U. S. 433; 10 Sup. Ct. Rep. 450; 33 L. Ed. 747].

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The many settlements of the building association bank book or pass book some sixteen in number, constitute a repeated ratification, of the credit which the officers of the bank give the building association on its books, by the bank and also by its directors. *Armstrong v. Bank*, 10 O. F. D. 600 [83 Fed. Rep. 556; 27 C. C. A. 601; 54 U. S. App. 462]; 1 Morse, Banks & Banking Secs. 291, 295; *Manhattan Co. v. Lydig*, 4 Johns. 377 [4 Am. Dec. 289]; *Mechanics & Farmers Bank v. Smith*, 19 Johns. 115; *Hepburn v. Bank*, 2 La. Ann. 1007 [46 Am. Dec. 564]; *Mechanics' Bank v. Banks*, 11 La. 261; *Wasson v. Lamb*, 120 Ind. 514 [22 N. E. Rep. 729; 6 L. R. A. 191; 16 Am. St. Rep. 342]; *Arnold v. Hart*, 176 Ill. 442 [52 N. E. 936].

Where a party has assumed a certain position in regard to some matter he will be estopped to assume a directly contrary position with regard to the same matter, especially if it be to the injury of another person. *Irwin v. Longworth*, 20 Ohio 581; *Schubert v. Realty Co.* 25 O. C. C. 336; *Post v. Wilson*, 5 Dec. Re. 368 (5 Am. L. Rec. 235); *Atlantic Bldg. Assn. v. Vogeler*, 5 Dec. 581 (7 N. P. 605); *Cheney v. Ketcham*, 7 Dec. 183 (5 N. P. 139); *State v. Railway*, 2 Dec. 300 (1 N. P. 292); *Stephens v. Stock Yards*, 5 Dec. Re. 334 (4 Am. L. Rec. 669; 1 Bull. 84); *London Banking Co. v. Ratcliffe*, 6 L. R. App. Cas. 722; 16 Cyc. 785.

Trust funds are entitled to be paid in advance of the general creditor. Morse, Banks & Banking Secs. 589, 590; *Brooke v. King*, 104 Iowa 713 [74 N. W. Rep. 683]; *Myers v. Board of Ed.* 51 Kan. 87 [32 Pac. Rep. 658; 37 Am. St. Rep. 263]; *Marquette (Fire & Water Comrs.) v. Wilkinson*, 119 Mich. 655 [78 N. W. Rep. 893]; 44 L. R. A. 493]; *Commercial Bank, In re*, 4 Dec. 108 (2 N. P. 170); *Jones v. Kilbreth*, 49 Ohio St. 401 [31 N. E. Rep. 346]; *Mad River Nat. Bank v. Melhorn*, 4 Circ. Dec. 401 (8 R. 191); *Commercial Bank, In re*, 2 Dec. 304 (1 N. P. 358).

G. P. Webb, for himself.

Flory & Flory, for defendant.

A. A. Stasel, for himself.

SEWARD, J.

George P. Webb, receiver of the Homestead Building & Savings Company v. A. A. Stasel, receiver of the Newark Savings Bank Company:

The petition states the amount that the plaintiff claims to be \$22,464.83. But the only portion litigated is the sum of \$14,000. I understand that to be correct?

Edward Kibler. Yes, sir.

The court. This is made up of two items, one of \$10,000 and the other of \$4,000, each of which appears as a credit to James F. Linga-

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felter, secretary of the Homestead Building and Savings Company under different dates.

Some time in 1902, probably in June, the State Bureau of Inspection of Building Associations, having charge of building associations—their inspection—ordered an examination of the Homestead Building and Savings Company.

That examination resulted in a finding that there was a shortage of some \$79,000. This was reported, and Mr. Lingafelter, secretary of the company, was notified of the fact. He claimed that the shortage was only apparent; that an examination of the books from the start would bear him out in his claim. It was agreed that an expert accountant should be employed to go over the books and determine the actual condition of affairs.

Lingafelter, anxious to declare and pay a dividend, proposed to put up \$10,000 out of his own funds, with which to pay a dividend.

Lingafelter, who was cashier of the bank and secretary of the Homestead Building and Savings Company, credits himself on the books of the bank with \$10,000, and the treasurer of the building association with a like sum on the pass book of the treasurer. Neither the \$10,000 nor the \$4,000 was deposited by Lingafelter in the savings bank at the time he credited himself as secretary with these several amounts, nor afterward, for that matter.

The transactions were purely fictitious, with an intent, as the court views it, to deceive the directors of the building association.

There was no semblance of good faith on the part of Mr. Lingafelter in either of these transactions. There was no cash passed at the bank and no credit asked for by him from the bank.

He had been informed that there was a shortage in the building association of a very considerable amount, something like \$79,000. He now became intensely interested in keeping this condition from the ears of the public, and especially those who were patrons of the institution of which he was secretary. It was time for the declaration and payment of a dividend. The building association under its management had no surplus earnings out of which a dividend could be declared, much less paid. The stockholders were not entitled to a dividend except out of the net earnings; there were none; on the contrary, there was a deficit of \$79,000 of which the secretary was then advised. A failure to declare a dividend he knew would result in an exposure of the condition, while the payment of a dividend would allay suspicion, if any existed.

To accomplish this purpose, this fictitious credit to himself, without the knowledge or consent of the bank, was made; and the stockholders received a dividend, which, under the circumstances, they were not entitled to, out of the funds of the bank. Each honestly thought that

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the dividend check received by him represented the earnings of the capital invested by him; but it did not; there were no earnings.

These two credits of \$4,000 and \$10,000 go to make up the balance, or a part of it, for which this suit is brought. The bank never got the money which these two credits are intended to represent.

The \$10,000 transaction occurred, as shown by the pass book, July 17, 1902; the \$4,000 transaction July 22, 1903, when Mr. Webber informed him of the discovery of another shortage and demanded that he pay it in.

As I have said, and I recur to it again, the inspector found that there was a shortage of some \$79,000. He called Mr. Lingafelter's attention to the fact, and Lingafelter insisted that it was only apparent: that a full examination would show that there was no shortage, and he wanted to declare a dividend. He was informed by the inspector that he could not. He said that he would pay in the money, with which to pay the dividend, out of his private funds.

I am not able to understand why such a proposition was entertained by the inspector. Revised Statutes 3836-18 (Lan. 6295) provides what should be done under such circumstances in the following language:

"Should the inspector find, upon examination, that the affairs of any such association are in an unsound condition, and that the interests of the public demand the dissolution of such association, and the winding up of its business, he shall so report to the attorney-general, who shall institute the proper proceedings for that purpose."

This was not done, and, therefore, these proceedings now before the court.

I am cited to the case of *Citizens' Sav. Bank v. Blakesly*, 42 Ohio St. 645. This is a case where Carlin & Company, a partnership, engaged in private banking business, issued to Blakesley a certificate of deposit on their bank. They were then insolvent but in good credit when they issued this certificate.

They ceased business and immediately were succeeded by a savings bank, incorporated under the laws of Ohio, doing business in the same building in which Carlin & Company had formerly done business.

This certificate issued to Blakesley, who was a minor, was presented at the savings bank, which gave to Blakesley a new certificate on the savings bank, marked the original canceled with a stamp of Carlin & Company, and charged to Carlin & Company. The members of the old firm were trustees of the new concern. Carlin & Company had some \$84,000 standing to their credit, which was really fictitious and unauthorized. One of the old firm was cashier, one was president and another assistant cashier. This certificate was renewed from time to time and finally was merged in the one in suit. The savings bank refused pay-

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ment and suit was brought upon the certificate. The Supreme Court held that the plaintiff had a right to recover.

It is claimed by the plaintiff that this case is authority in the case at bar. But, it will be observed that there is quite a distinguishing feature in that case from the case at bar. In that case, the money was received by Carlin & Company; they retained it; the new concern undertook to, and did, pay off and redeem many of the certificates issued by Carlin & Company, and the court holds that the transaction was in effect a payment by the bank to Carlin & Company of the amount of that certificate and a redeposit by Blakesley in the bank. That is the holding of the court and the theory upon which they find for the plaintiff.

In this case the bank received nothing from Lingafelter, as secretary, to induce the credit, and unless the fraudulent act of Lingafelter was the act of the bank it would not bind the bank, without the knowledge or assent of the directors of the bank.

This credit was fraudulently made by the cashier who was also secretary of the building association, to pay a pretended dividend to the stockholders which was not due the stockholders. No dividend could be legally declared or paid; and while this amount might have been checked out, the bank was in no way responsible for the misappropriation of this fund. So I do not think the Blakesley case is in point.

Lingafelter was acting in a dual capacity: as secretary of the building association and as cashier of the bank, in this very transaction; and the transaction itself was an attempt to make the bank, of which he was cashier, debtor to the building association, without any consideration moving from the building association to the bank to create the relation of debtor and creditor.

It is claimed that the building association, upon the faith of this credit, paid out the amount to its stockholders as dividends. Well, the stockholders were not entitled to a dividend, and each received more than was coming to him in just the amount he received as a dividend. Under what principle of law or equity can he claim that the building association is entitled to recover this amount, that he may ultimately participate in its distribution?

Chemical Nat. Bank v. Armstrong, 7 O. F. D. 219 [50 Fed. Rep. 798], is cited. The court has examined all these authorities at hand, and there were a great many of them. Where a bank in good faith advanced money on collateral forwarded to it by the vice president of another bank, and charged the loans to the latter, its rights are not affected by the fact that the transaction was fraudulent as between the vice president and the bank which he represented, for the vice president had authority to negotiate the loan, and the validity was not affected by his fraud.

Had Mr. Lingafelter, as cashier of this bank, authority to make a

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loan to himself as secretary, and take no note or other paper as evidence of that indebtedness; simply crediting himself on the books of the bank; had he authority to do that? The court thinks not.

Innerarity v. Bank, 139 Mass. 332-335 [1 N. E. Rep. 282; 52 Am. Rep. 710], I believe was not cited, as to knowledge of Lingafelter, the cashier, being knowledge of the bank, of which he was cashier: I will read some from the decision in this case. It is a Massachusetts case:

"A shipped a cargo of sugar to B, and gave him authority to sell the same. The bill of lading recited that the shipment was by order of B, and that the sugar was deliverable to his order, and made no mention of any agency. B indorsed the bill of lading, and delivered it to a bank of which he was a director, and pledged the cargo to the bank as security for a loan by the bank to him. This loan was approved by the board of directors, at a meeting at which B was present: *Held*, that B's knowledge of the fraud was not imputable to the bank; and that an action by A against the bank, for the conversion of the sugar, could not be maintained."

The court say at page 333:

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

Suppose that Lingafelter had communicated his design in this matter to the directors of the bank, would anybody suppose that the matter would be consummated or could be consummated? The court thinks not.

Page 335:

"The proposition that a director of a corporation acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority."

This decision cites a number of authorities.

"In some of these cases, weight appears to be given to the fact that the director was not actually present at the meeting when the transaction was concluded; but this cannot be of importance. If it were shown that Burgess urged the loan upon the board of directors, and actually voted in favor of it, his associates not seeing fit to intervene or object to this conduct, he would still have acted on his own behalf, and of those whose interests and efforts were of necessity adverse to those of the corporation. To assume that, under such circumstances, the facts he

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knew were communicated to the directors, and that he laid before them the fraud he was committing in wrongfully pledging property, would be a presumption too violent for belief, and would do great injustice to the remaining directors and the interests they represented."

So, the court finds for the defendant, and makes an order dismissing the petition.

Edward Kibler. It is conceded that there is \$8,000 due us there that we are entitled to judgment for.

The court. Well, yes; whatever is conceded. I mean as to the \$14,000. I thought the \$8,000 was entirely out of the case, but I remember that now.

Edward Kibler. We are entitled to a judgment for the costs.

Mr. Stasel. The answer admits all except the \$14,000.

The court. That may be, but if they were forced to bring a suit against you to get that admission, I think it should carry costs.

Mr. Stasel. They were not forced to do that.

Edward Kibler. We would like to have a special finding of the facts and law.

Mr. Stasel. When the claim was presented, the admission was made that that amount was due.

Edward Kibler. They admit a part and dispute a part, after having rejected the whole claim.—

The court. The costs will follow the case. There will be a judgment for the amount admitted to be due, and the costs will follow the case.

Edward Kibler. I would like to have the court fix the bond for appeal; and also a separate finding of facts and law.

The court. The gentlemen can prepare it.

Mr. Flory. I suppose the judgment is simply a judgment for the allowance of the claim.

The court. That the receiver allow the claim.

Edward Kibler. Oh, yes.

The court. Is that even \$8,000?

Edward Kibler. Yes, sir.

The court. Bond \$50?

Edward Kibler. Yes, sir.

The court. Do you have to give a bond?

Edward Kibler. The court may fix it anyhow.

The court. Judgment for plaintiff for—amount. That will be the \$8,000 or whatever it is. Notice of appeal; bond \$50.

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HEALTH—NUISANCES.

[Hamilton Common Pleas, November 24, 1906.]

BENJAMIN KAISER V. EDWARD WALSH, ASST. MILK INSPECTOR OF CINCINNATI.

1. BOARD OF HEALTH MAY CONFISCATE AND DESTROY MILK ABOVE CERTAIN TEST.

A resolution of a board of health, providing that "All milk the temperature of which shall be found on examination or test to be above fifty degrees Fahrenheit, shall be confiscated, forfeited, and immediately destroyed by or under the direction of a health officer or milk inspector," is not unconstitutional.

[For other cases in point, see 2 Cyc. Dig., "Constitutional Law," §§ 289-300; 6 Cyc. Dig., "Municipal Corporations," §§ 1736-1737.—Ed.]

2. WHEN THINGS CONSTITUTING NUISANCES MAY BE DESTROYED.

There are some things which are public nuisances by nature. Such are things which are harmful to the public health, as unwholesome food. An ordinance providing for the immediate destruction of such nuisances by an official is not in contravention of that constitutional guarantee which provides that no man's property may be taken without due process of law. When the thing itself is not a nuisance * * * as a house or animal, for instance, * * * but the way in which it is used is a nuisance, then the thing cannot be destroyed; its illegal use must be punished.

[For other cases in point, see 6 Cyc. Dig., "Nuisance," §§ 214-216; 6 Cyc. Dig., "Municipal Corporations," §§ 1753-1758.—Ed.]

[Syllabus by the court.]

Renner & Renner, for plaintiff in error.

J. R. Schindel, for defendant in error.

LITTLEFORD, J.

The petition states that Kaiser, the plaintiff, sells milk in Cincinnati and that Walsh, the defendant, is the milk inspector, and that the defendant, Edward Walsh, the milk inspector of the city of Cincinnati on August 24, 1906, got upon one of plaintiff's milk wagons, and, after inserting a thermometer into a can of milk to ascertain its temperature, threw the milk into the street.

The petition further says that the defendant, Edward Walsh, threatens to, and will unless restrained by this court, again board some one of plaintiff's milk wagons to test the temperature of the milk, and if he finds on test that the milk is above fifty degrees Fahrenheit, he will again destroy the milk.

The petition further says that the defendant is acting under a resolution of the board of health of the city of Cincinnati, adopted July 17, 1906, a copy of which is set forth, and one clause of which reads:

"All milk the temperature of which shall be found on examination or test to be above fifty degrees Fahrenheit, shall be confiscated, forfeited, and immediately destroyed by or under the direction of the health officer or milk inspector."

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Plaintiff further alleges in his petition that this resolution is unconstitutional, null and void and of no effect, and is in contravention of Art. 1, Secs. 1, 5, 10, 14, 16 and 19, of the bill of rights, and Art. 4, Sec. 1 of the constitution of the state of Ohio, and Arts. 4, 5, 6, and 14, in addition to, and amendment of, the constitution of the United States of America. On the ground that this resolution is unconstitutional plaintiff prays that the defendant be restrained from continuing to do the acts complained of.

The constitutional provisions which are referred to are as follows: Art. 1, Sec. 1, guarantees the right to possess and protect property; Sec. 5 provides that the right of trial by jury shall be inviolate; Sec. 10 provides that no person shall be held to answer for crime unless on presentment or indictment of a grand jury, and to have a speedy trial by an impartial jury; Sec. 14 guarantees the right of the people against unreasonable searches and seizures; Sec. 16 insures to every person, for an injury done him in his lands, goods, person or reputation, remedy by due course of law; and Sec. 19 is to the effect that private property shall not be taken for public use until compensation therefor shall first be made in money. Article 4, Sec. 1, of the constitution of the state of Ohio provides that judicial power shall be vested in certain courts, naming them.

Articles 4, 5, 6 and 14 in addition to, and amendment of, the constitution of the United States of America are as follows: Art. 4 forbids unreasonable searches and seizures; Art. 5 provides that no person shall be held to answer for crime except upon presentment or indictment by a grand jury, nor shall he be deprived of life, liberty or property without due process of law; Art. 6 provides for public trial by an impartial jury, and Art. 14 provides that no state shall deprive any person of life, liberty or property without due process of law.

It will be seen that these constitutional sections frequently overlap each other. To sum up these numerous provisions upon which the plaintiff relies, it may be said that they amount to this: that no man shall be deprived of his property without due process of law.

It should be said here that the resolution of the board of health has the same effect as an ordinance by virtue of Rev. Stat. 2119 (Lan. 3481; B. 1536-731).

In support of his contention, the learned counsel for plaintiff cites the following cases: *Rosebaugh v. Saffin*, 10 Ohio 31, holds that an ordinance providing for the sale of straying hogs, after keeping them three days and advertising the same, is unconstitutional. *Fagin v. Humane Soc.* 9 Dec. 341 (6 N. P. 357), holds that a statute authorizing the humane society to dispose of unlicensed dogs is unconstitutional. *Yensen v. State*, 9 Dec. 168 (7 N. P. 18), holds that a statute giving authority to any person to destroy fish nets which are being used in

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violation of law, is unconstitutional; and the same holding with reference to fish nets is made in *French v. Shirley*, 9 Dec. 181 (7 N. P. 26). *Archer v. Baertschi*, 4 Circ. Dec. 416 (8 R. 12), holds that an ordinance of the city of Toledo providing for the sale of dogs found running at large without license check, is unconstitutional. *Edson v. Crangle*, 62 Ohio St. 49 [56 N. E. Rep. 647], holds that a statute authorizing the seizure of a fish net which is being illegally used, is unconstitutional. *King v. Hayes*, 80 Me. 206 [13 Atl. Rep. 882], holds that a statute authorizing an officer of a humane society to condemn and kill a horse that is of no value to the owner, is unconstitutional.

As against this array of cases, the learned counsel for the defendant cites two well-considered cases which hold that an ordinance providing for the destruction of milk, just like that under consideration, is not contrary to any constitutional provision. These two cases are the following: *Blazier v. Miller*, 10 Hun 435, holds that an ordinance of the board of health of the city of Syracuse, authorizing the milk inspector to destroy milk, which he has reasonable cause to believe is below standard, is a valid ordinance. *Deems v. Baltimore*, 80 Md. 164 [30 Atl. Rep. 648; 26 L. R. A. 541; 45 Am. St. Rep. 339], holds that the constitutional guaranties concerning property and liberty are not to be construed as abridging the power of the state to pass a law authorizing an official to destroy milk found to be below the legal standard.

In addition to these cases, the following authorities are cited for the defendant:

"It is fairly established by adjudications too numerous to mention, that a state may, in the exercise of its police power, authorize the destruction of such property as has become a public nuisance, or has an unlawful existence, or is noxious to the public health." *Houston v. State*, 98 Wis. 481, 486 [74 N. W. Rep. 111; 42 L. R. A. 39].

"The acknowledged police power of a state extends even to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. * * * It is a power essential to self-preservation, and exists, necessarily, in every organized community." *License Cases*, 46 U. S. (5 How.) 504, 589 [12 L. Ed. 256].

"An act which * * * makes animals with contagious diseases or infectious diseases, common nuisances, authorizing their destruction by certain officials under certain conditions" is not unconstitutional. *Newark & S. O. H. C. Ry. v. Hunt*, 50 N. J. Law 308 [12 Atl. Rep. 697].

"It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing, and of impure and unwholesome

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food, are plainly of this description. They are nuisances *per se*, and their abatement is their destruction. So, also, there can be little doubt, as we conceive, that obscene books or pictures, or implements only capable of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if so directed by statute. The keeping of a bawdyhouse, or a house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept would not be justified as the exercise of the power of summary abatement, and it would add nothing, we think, to the justification, that a statute was produced authorizing the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house in using or allowing it to be used for the immoral purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction, in common law or precedent." *Lawton v. Steele*, 119 N. Y. 226, 238 [23 N. E. Rep. 878; 7 L. R. A. 134; 16 Am. St. Rep. 813].

A well-considered case in Ohio is *Deming v. Cleveland*, 12 Circ. Dec. 198 (22 R. 1). It was a case in which a stream of water, running through plaintiff's land, was diverted from its course by the council of the city of Cleveland and turned into an artificial water course above the plaintiff's premises. It appears that the banks of the stream were so covered with rubbish and filth as to make the stream a nuisance. The court held that the act of the legislature conferring a power on the city of Cleveland to divert this stream was unconstitutional and void. In the long and well-considered opinion, the learned court evidently recognizes the principle that while a statute or an ordinance cannot decree the destruction of property because it is used in some improper way so as to be a menace to the public health, just to punish the owner of the property for so using it, still it can decree the destruction of property, the very existence of which endangers the health of the public.

The adoption of the provisions of the constitution of the United States and of the state constitutions, that no man shall be deprived of his property without "due process of law," did not abolish the principle of the common law that either the king or any of his subjects had the right to summarily abate a public nuisance—for such abatement was due process of law within the meaning of Magna Charta. If a mistake was made, then there was a cause of action.

If a private individual may abate a public nuisance, a duly authorized official, acting under the provisions of a statute or ordinance, can certainly do so.

There are some things which are public nuisances by nature. Such are things which are harmful to the public health, as unwholesome food.

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An ordinance providing for the immediate destruction of such nuisances by an official is not in contravention of that constitutional guarantee which provides that no man's property may be taken without due process of law. When the thing itself is not a nuisance as a house or animal, for instance, but the way in which it is used is a nuisance, then the thing cannot be destroyed; its illegal use must be punished. The demurrer is sustained.

INJUNCTION—TRADE-MARKS AND TRADE NAMES.

[Licking Common Pleas, September Term, 1905.]

PROSPECT NAT. MILL CO. v. CHARLES FREDERICK SITES.

MISUSE OF TRADE NAME MAY BE ENJOINED.

A person who has sold a flouring mill and the right to make and sell a particular brand of flour, reserving to himself the right to sell such flour in a particular territory, may be enjoined from selling, outside of that territory, an inferior quality of flour, using the established brand and the name of the company succeeding to his rights.

[For other cases in point, see 5 Cyc. Dig., "Injunction," §§ 296-322.—Ed.]

[Syllabus approved by the court.]

Hunter & Hunter and Copeland & Bartram, for plaintiff:

Cited and commended on the following authorities. *Lippman v. Martin*, 8 Dec. 485 (5 N. P. 120); *Feder v. Brundo*, 8 Dec. 179 (5 N. P. 275); *Cincinnati Vici Shoe Co. v. Shoe Co.* 9 Dec. 579 (7 N. P. 135); *Cigar Maker's Internat. Union v. Burkhardt*, 9 Dec. 459 (6 N. P. 342); *Reeder v. Brodt*, 6 Dec. 248 (4 N. P. 265); *Piso Co. v. Voight*, 6 Dec. 479 (4 N. P. 347); *Brill v. Manufacturing Co.* 41 Ohio St. 127 [52 Am. Rep. 74]; *Buckhardt v. Buckhardt*, 42 Ohio St. 474 [51 Am. Rep. 842]; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337 [67 N. E. Rep. 722]; *National Biscuit Co. v. Baking Co.* 14 O. F. D. 303 [127 Fed. Rep. 160].

Kibler & Kibler, for defendant:

Law where the whole good will, etc., of the business is sold, is not applicable. *United Hatters of N. A. v. Loeb*, 12 Circ. Dec. 272 (22 R. 339).

An action at law is the only remedy for past offenses. *United Hatters of N. A. v. Loeb*, 12 Circ. Dec. 272 (22 R. 339); *Brass & Iron Wks. v. Payne*, 50 Ohio St. 113 [33 N. E. Rep. 88; 19 L. R. A. 82].

Facts must be stated to show that the injury is or will be irreparable. *Van Wert (Vil.) v. Webster*, 31 Ohio St. 420; *Wood v. Pleasant Ridge (Vil.)* 5 Circ. Dec. 516 (12 R. 177); *Goodall v. Crofton*, 33 Ohio St. 271 [31 Am. Rep. 535].

The words of the statute must be incorporated. *Burckhardt v. Burckhardt*, 42 Ohio St. 474 [51 Am. Rep. 842].

Mill Co. v. Sites.

SEWARD, J.

This case is submitted to the court upon a general demurrer to the petition. The action was brought by the plaintiff to enjoin the defendant from using certain brands or labels upon flour. The petition alleges that Charles Frederick Sites and David M. Black were partners, and that they owned a mill in Prospect, Marion county, Ohio; that they manufactured at that mill a certain brand of flour known as the Clover Leaf brand, and that they had acquired quite a large trade upon that brand of flour; that they sold that mill, with the real estate, the good will and all appurtenances to one John D. Owens for \$5,950—\$5,000 for the mill, plant, good will, etc., and I believe \$950 for the material in the mill; that Owens, after he bought the mill from these parties, organized a corporation, that corporation being the plaintiff in this case, the Prospect National Mill Company; that he sold this property (bought by him from Black and Sites) to the plaintiff, and the plaintiff engaged in the manufacture of the same kind of flour. In this sale of property by Black and Sites, it was agreed that Sites should have the right to sell this brand of flour—the Clover Leaf brand—in Licking county, but not elsewhere. I will read that part of the petition, because it is vital as bearing upon the question of the violation of the terms of this contract:

“And plaintiff further says that Sites, notwithstanding his said agreement and duty, and in violation of the rights of said plaintiff in this behalf, has been engaged from the time of his said sale and transfer to the present time in vending flour, not manufactured by the said plaintiff nor by himself, nor by anyone connected with the manufacture of flour in said town of Prospect, nor manufactured in or near said village of Prospect, under the false pretense that it is manufactured by the National Mill Company of Prospect, Ohio, but he simply gathers up flour wherever he can, regardless of its grade and quality, and being flour of a poor and inferior grade and vastly inferior to the grade of Clover Leaf flour aforesaid; that in vending said flour he falsely represents and is representing that it is Clover Leaf flour, fully patented and manufactured by the National Company of Prospect, Ohio; that all of said packages of flour which he has sold and is still selling in Licking county and elsewhere is marked and designated in large letters and device as follows: National Mills, Clover Leaf, fully patented. The National Mill Company, Prospect, Ohio—with a clover leaf as the device; that by means thereof said Sites falsely represents that said flour is Clover Leaf flour manufactured by the Prospect National Mills Company at Prospect, Ohio; that there is no National Mill Company or mill of that name existing or known in said town of Prospect, Ohio, but the plaintiff, and that this is done to induce purchasers to believe that the flour he so offered and sold, and still offers to sell, is

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the true Clover Leaf flour, manufactured by the Prospect National Mill Company, of Prospect, Ohio, the said plaintiff, and does induce purchasers to buy, deal in and use the same; that large numbers of persons and dealers in flour are induced to purchase and use said inferior flour, believing it is genuine Clover Leaf flour, manufactured by the plaintiff; that plaintiff, since the said transfer to it, has continued to manufacture said flour, keeping up the standard of the same to its highest point of grade and quality as aforesaid; that by reason of the premises, purchasers and dealers have refused to purchase flour from the plaintiff, believing that it manufactured the inferior flour so vended and offered by Sites, and the reputation and standing of said flour in the localities where it has been offered has suffered, and it has become impossible to vend the same by plaintiff; that the reputation of said plaintiff as a fair dealer and manufacturer of good flour, and especially Clover Leaf flour, has been grossly injured; that its damages are difficult of computation and irreparable."

There is a prayer for an injunction, and a temporary injunction was granted.

It is claimed on the part of the defendant, Sites, that there was a reservation in this sale made by Black and Sites to Owens, and therefore the reservation continued in Sites after the sale to plaintiff of the property; and that as it was not an entire sale of the good will that this injunction ought not to have been granted.

The parties who sold the property were Sites and Black, and it was agreed that Sites should have the right to vend Clover Leaf flour in Licking county, but not elsewhere. This petition alleges that he is not only vending it in Licking county—this brand of flour of an inferior grade—but that he buys it wherever he can, and that he sells it under representations that it is manufactured at Prospect, Ohio; sells it elsewhere than in Licking county.

The court is cited to *United Hatters of N. A. v. Loeb*, 12 Circ. Dec. 272 (22 R. 339), and to *Burckhardt v. Burckhardt*, 42 Ohio St. 474 (51 Am. Rep. 842). *Burckhardt v. Burckhardt*, is one that arose in Cincinnati; Leopold and Frederick Burekhardt were partners under the name of Burekhardt & Company, engaged in quite an extensive business there; and they agreed to dissolve, the one to sell out to the other. Frederick Burekhardt bought out Leopold's interest in the property. The appraisement was \$166,000 for the entire property, including the good will, or \$83,000 for Leopold's half. And he bought the good will of the business, Leopold agreeing not to go into business under the name of Burekhardt & Company. Leopold afterwards started up in business under the name of L. Burekhardt & Company. Frederick Burekhardt had given his mortgage to Leopold for a part of the goods; the mortgage was attempted to be foreclosed, and there was set

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up, as a defense, damages by virtue of the use of the name of L. Burekhardt & Company, and also other means whereby he violated his contract; and the court held that he was liable in damages in that case.

The case *United Hatters of N. A. v. Loeb, supra*, arose in Cleveland, and a demurrer was filed to the petition for the reason that the petition did not state facts constituting a cause of action. And if the facts in that case were the same as the facts in this case this demurrer would have to be sustained if the court followed the circuit court in another circuit. The circuit court say, at page 340:

"This action comes into this court by appeal. The trial court sustained a general demurrer to the petition and rendered judgment for the defendant. The action was prosecuted in the court of common pleas to enjoin the defendant from using, selling or displaying hats, caps or goods of any description, bearing any imitation or counterfeit of a certain design or device adopted in form authorized by the statute by the plaintiff to distinguish products made, manufactured or prepared by the members of the association of workmen, known as 'the United Hatters of North America.'

"After alleging the facts upon which the plaintiff relies to sustain its right to the exclusive use of such device, it is averred that the defendant so engaged in the sale and display of hats and caps; that they have been using, selling and displaying hats and caps bearing imitations and counterfeits of the design and device of this plaintiff association.

"It is nowhere alleged in the petition that the defendants are now using, selling, or displaying hats and caps bearing any imitation of the design of which the plaintiff claims an exclusive use. There is no allegation of any threatened injury in the future by the defendant, of the plaintiff's rights. For past offenses, an action at law is the plaintiff's only remedy."

But this petition alleges that Frederick Sites is vending this flour. An injunction can be invoked to restrain the present doing of a thing as well as the future; to stop what is being done in the present, and that is what this petition alleges—that he is vending this flour. And the court cannot say but what he is interfering with the rights of the plaintiff in this case, and the court granted the injunction upon that theory—that he was selling flour here which the public might think, and had reason to believe was, the flour that was manufactured at Prospect, Ohio, by this mill that he had sold out; and the petition alleging that he is buying the flour elsewhere, and that it is an inferior make of flour, the court thinks that the plaintiff is entitled to this injunction, and thinks the petition makes a cause of action for an injunction, and the demurrer may be overruled and exceptions taken.

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By Judge Kibler. The finding of the court is, that Sites didn't get anything by that reservation?

The court. He got what was granted to him. It isn't a reservation. They were to grant him the right. Black and Sites sold to this company all their rights in this concern, and they agreed to grant him the right to sell in Licking county. He gets the right to sell in Licking county, but he doesn't get the right to sell elsewhere than in Licking county.

CHECKS—PLEADING.

[Franklin Common Pleas, May 4, 1906.]

EMMA BLATH V. ROBERT YOUNG.

SUFFICIENCY OF AVERMENTS IN SUIT ON CHECK.

In an action against the drawer of a check, the averment that the check was duly indorsed and assigned to the plaintiff for value is insufficient to show a right of action in the plaintiff.

[For other cases in point, see 1 Cyc. Dig., "Bills, Notes and Checks," §§ 1549-1601.—Ed.]

[Syllabus approved by the court.]

Huggins, Huggins & Johnson, for plaintiff.

E. E. Tanner, for defendant.

BIGGER, J.

The defendant has filed a general demurrer to the petition. The action is brought by the plaintiff against the defendant as the drawer of a check on the bank of P. W. Huntington & Company, payable to one Schulhafer, and indorsed by the said Schulhafer to plaintiff. It is averred that the check was duly indorsed and assigned to plaintiff for value. These averments are not sufficient to constitute a cause of action against the drawer of the check. The holder of a check has no right of action upon it against the drawer until it has been presented to the bank for payment and payment refused. The check has in it no words of negotiability. It is not drawn payable to Schulhafer or order or to bearer. Therefore the bank was not under any obligation to honor the check when presented by the plaintiff, as it was not made payable to an indorsee. Therefore, there is no right of action against the drawer.

If it be suggested that this might be sufficient as an assignment of a chose in action, the answer to that claim is, that the averments here are not the equivalent of an averment of a right of action in the payee against the drawer of the check. He may have had no such right of action and no chose in action to assign. Negotiable instruments import a consideration but this is not a negotiable instrument. There is no averment of any consideration moving from Schulhafer to Young.

The demurrer must, therefore, be sustained.

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CONSTITUTIONAL LAW—LICENSE OF OCCUPATION—MUNICIPAL CORPORATIONS.

[Franklin Common Pleas, November 24, 1906.]

LEWIS L. PEGG ET AL. V. COLUMBUS (CITY) ET AL.

J. F. LINTON V. COLUMBUS (CITY).

COLUMBUS (CITY) V. D. C. BADGER, MAYOR, ETC., ET AL.

1. MUNICIPALITY HAS POWER TO REGULATE USE OF STREET.

A municipality has power to regulate the use of its streets and compel, by imposition of a fine, the payment of a license for the use thereof; hence, an ordinance providing that no vehicle shall be used upon the streets of a city unless a license shall have been obtained from the city, in conformity to provisions of the ordinance, is not unconstitutional.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 1801-1816.—Ed.]

2. NONRESIDENTS NEED NOT PAY LICENSE FOR USE OF STREETS.

A municipal ordinance that requires a license fee to be paid by all drivers of vehicles upon the streets of such city is not to be construed to include persons living without the municipal limits and who occasionally drive over the streets of said city.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 416-434.—Ed.]

[Syllabus approved by the court.]

M. E. Thrailkill, for Lewis L. Pegg et al.:

License defined. 21 Am. & Enc. Law (2 ed.) 773.

Difference between a license and a tax. 21 Am. & Eng. Enc. Law (2 ed.) 774.

The exemption of a farmer and gardener from the operation of such ordinance is legal. *Marmet v. State*, 45 Ohio St. 63 [12 N. E. Rep. 463].

Such an ordinance does not apply to farmers and gardeners marketing the products of their own farms and gardens. *Davis v. Macon (Mayor)*, 64 Ga. 128 [37 Am. Rep. 60]; *Collinsville v. Cole*, 78 Ill. 114; *St. Charles v. Nolle*, 51 Mo. 122 [111 Am. Rep. 440]; *Marmet v. State*, 45 Ohio St. 63 [12 N. E. Rep. 463].

The city council had no jurisdiction to exact a license of non-resident farmers. *St. Charles v. Nolle*, 51 Mo. 122 [111 Am. Rep. 440]; *Collinsville v. Cole*, 78 Ill. 114; *Douglas v. Kansas City*, 147 Mo. 428 [48 S. W. Rep. 851]; *Cary v. North Plainfield*, 49 N. J. Law 110 [7 Atl. Rep. 42]; *Commonwealth v. Stodder*, 56 Mass. (2 Cush.) 562 [48 Am. Dec. 679]; *New York v. Hexamer*, 59 N. Y. App. Div. 4 [69 N. Y. Supp. 198]; *Jacobs, In matter of*, 98 N. Y. 98 [50 Am. Rep. 636]; *Garden City v. Abbott*, 34 Kan. 283 [8 Pac. Rep. 473].

If the ordinance is unfair as between two horse farm wagons and

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to horse coal wagons, or two horse milk wagons and two horse beer wagons it is void. *Yensen v. State*, 9 Dec. 168 (7 N. P. 18).

If it does not operate equally on all it is void. *Yensen v. State*, 9 Dec. 168 (7 N. P. 18); *State v. Gardner*, 58 Ohio St. 599 [51 N. E. Rep. 136; 41 L. R. A. 689; 65 Am. St. Rep. 785]; *Palmer v. Tingle*, 55 Ohio St. 444 [45 N. E. Rep. 313].

The city cannot license for revenue, but can only license to regulate the use. Revised Statutes 1536-102 (Lan. 3104); *The Laundry License Case*, 22 Fed. Rep. 701.

If the license produces a revenue beyond the cost of putting into effect and enforcing the ordinance, it becomes a tax, and is void. *Dillon*, Munic. Corp. Secs. 253, 257, 768; *Kip v. Paterson*, 26 N. J. Law 298; *State v. Hoboken*, 33 N. J. Law 280; *Bennett v. Birmingham*, 31 Pa. St. 15; *Jackson v. Newman*, 59 Miss. 385 [42 Am. Rep. 367]; *Fort Smith v. Ayers*, 43 Ark. 82; 2 Cooley, Taxation (3 ed.) 1141.

The city cannot under the guise of a police regulation, impose a trammel on constitutional rights. *State v. Julow*, 129 Mo. 163 [31 S. W. Rep. 781; 29 L. R. A. 257; 50 Am. St. Rep. 443]; *The Stockton Laundry Case*, 26 Fed. Rep. 611.

The regulation of the use of the streets cannot be expensive. 2 Cooley, Taxation (3 ed.) 1142.

If the ordinance is partial, it is void. *Jacobs, In matter of*, 98 N. Y. 98 [50 Am. Rep. 636].

If the ordinance is unreasonable it is void. *Stull v. DeMattos*, 62 Pac. Rep. 451-453 (Wash.).

If it is unjust or unreasonable it is void. *Frank, Ex parte*, 52 Cal. 606 [28 Am. Rep. 642]; *Sipe v. Murphy*, 49 Ohio 536 [31 N. E. Rep. 884; 17 L. R. A. 184].

If it exceeds the cost of putting it into effect it should be construed as a revenue measure and be held void as a tax. *Frank, Ex parte*, 52 Cal. 606 [28 Am. Rep. 642]; *Kip v. Paterson*, 26 N. J. Law 298.

The right to engage in a lawful business, when not harmful is a constitutional attribute of citizenship. *Yick Wo v. Hopkins*, 118 U. S. 356 [6 Sup. Ct. Rep. 1064; 30 L. Ed. 220]; *Barbier v. Connolly*, 113 U. S. 27 [5 Sup. Ct. Rep. 357; 28 L. Ed. 293]; *Jacobs, In re*, 98 N. Y. 98 [50 Am. Rep. 636].

If it is a tax on account of it being a revenue measure, then it must be levied according to the true value of the vehicle in money. Art. 12, Sec. 2; *Bowser v. Thompson*, 103 Ky. 331 [45 S. W. Rep. 73].

This ordinance is not of uniform operation on all vehicles. It is not exacted of owners of street cars which are "vehicles" under the law. *Cincinnati St. Ry. v. Snell*, 54 Ohio St. 197 [43 N. E. Rep. 207; 32 L. R. A. 276]; *Cin. & H. Elec. St. Ry. v. Railway*, 12 Circ. Dec. 113

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(21 R. 391); *Clev. C. C. & St. L. Ry. v. Railway*, 26 O. C. C. 180; *Railway v. Railway*, 64 Ohio St. 550.

Additional authorities. Art. 12, Sec. 5 of the constitution; *State v. Pohling*, 1 Circ. Dec. 271 (1 R. 486); Rev. Stat. 2669 (Lan. 3950; B. 1536-327); Rev. Stat. 1536-100, 1536-102, 1536-201 (Lan. 3102, 3104, 3991); *Mays v. Cincinnati*, 1 Ohio St. 269; *Hurlaub v. Cincinnati*, 28 O. C. C. 797; *State v. Finch*, 78 Minn. 118 [80 N. W. Rep. 856; 46 L. R. A. 437]; 2 Cooley, Taxation (3 ed.) 1139; *Frank, Ex parte*, 52 Cal. 606 [28 Am. Rep. 642]; *St. Charles v. Nolle*, 51 Mo. 122 [11 Am. Rep. 440]; *Western Union Tel. Co. v. Fremont*, 39 Neb. 692 [58 N. W. Rep. 415]; *Cary v. North Plainfield*, 49 N. J. Law 110 [7 Atl. Rep. 42]; *Douglas v. Kansas City*, 147 Mo. 428 [48 S. W. Rep. 851]; *New York v. Hexamer*, 59 N. Y. App. Div. 4 [89 N. Y. Supp. 198]; *Garden City v. Abbott*, 34 Kan. 283 [8 Pac. Rep. 473].

Paul Jones, for city of Columbus.

J. A. Godown, for J. F. Linton.

G. S. Marshall, C. E. Carter and E. L. Weinland, city solicitors, for defendants.

DILLON, J.

These cases involve both the construction and constitutionality of an ordinance passed by the city of Columbus, in March, 1905, being number 21927, the purpose of which is declared to be to license to regulate the use of the streets of the city of Columbus, by requiring that no vehicle shall be used upon the streets of said city unless a license to so use said vehicle has been obtained in accordance with the provision of said ordinance. A punishment is provided for any person who shall violate the same. It is further provided that the city auditor shall charge, as a fee for the license, a sum ranging from fifty cents for each bicycle to the sum of \$10 for any vehicle drawn by four horses. On push carts and street pianos the license fee is \$1 per year; on each vehicle, buggy or other vehicle drawn by one horse the fee is \$1.50. For two horse \$3.50, etc. The ordinance requires that the number, tag or check shall be exhibited upon a conspicuous place upon the harness or vehicle, with lettering of such size as will easily be distinguishable. Further provision is made in the ordinance for requiring automobiles and other auto cars to carry at night certain lights, among others a white light to show this identification tag. The ordinance further creates a vehicle fund and provides that if there be any money remaining over after the expenses of issuing a license, etc., have been paid, it shall be used for the repairs of the streets. No exception is made in behalf of any person.

Case number 51881 is brought by L. L. Pegg and fourteen other farmers living near the city, who haul their produce to the city and

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... occasionally for the purpose of trade. The claim is ... the ordinance does not apply to nonresidents of the city, ... people of their business.

... other two cases seek to declare the entire ordinance void in all ... and as to all persons. The main contention, and the one which ... court feels called upon to discuss chiefly is the contention of the ... that the so-called license and money exacted therefor is not ... fact, and as a matter of law, a license, but is a tax, and therefore, ... in derogation of the constitution and inhibition in that regard and void. That a city has no power to raise taxes in this manner is of course well settled, and as said by Ranney, J., in *Mays v. Cincinnati*, 1 Ohio St. 268, 273,

"The power to tax is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent, and without other compensation than the promotion of the public good. * * * Being a sovereign power, it can only be exercised by the general assembly, when delegated by the people in the fundamental law; much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body. * * * A license may include a tax or it may not. If the exaction goes no further than to cover the necessary expenses of issuing it, it does not; but if it is made a means of supplying money for the public treasury, we agree with the court in *Lucas v. Lottery (Comrs.)*, 11 Gill & Johns 490, 506, that it 'is a tax, is too palpable for discussion.' "

In two of the cases the parties have made certain agreed statements of facts in the case, among others, that the amount for clerical services, licenses, blanks, tags and numbers is \$3,000 per annum. That there will be received by the city from its own territorial limits between \$20,000 and \$30,000. Outside the city there are some four thousand farmers and gardeners who trade and occasionally, more or less often, come to the city with their products or for other purposes. Next, the actual cost of repair and care of streets amounts to not less than \$50,000 per annum. The money required annually for police duty upon the streets and for regulation thereof, and to prevent fast and reckless driving, to prevent blockades, and to protect pedestrians at crossings, is uncertain in amount, but would not exceed \$30,000 per year. If any fair proportion of those expenses be admitted, the question arises as to whether or not the city is limited in regulating a particular business which demands and requires regulation to the mere clerical work of issuing the license, or whether the fee may be large enough to include and cover the expenses of regulation itself. That the city council has express power of the legislature to regulate the use of its streets is conceded and is specially conferred by it in the code. The city of Columbus has numerous ordi-

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nances besides the one in question which relate solely to the use of the streets, such as the weight of loads to be carried, the width of tires, the speed of vehicles, automobiles, the charges which certain vehicles may make for hauling or carrying passengers and other preventive measures for the care and safety of pedestrians, and also for the prevention of negligence, blockades, and has specially provided for in this ordinance itself a means of identification of the owner of various vehicles. These regulations are made necessary solely by virtue of the use of the streets. These regulations are wholesome, and the Supreme Court in the case of *Marmet v. State*, 45 Ohio St. 63 [12 N. E. Rep. 463], holds in the first syllabus that,

"The general assembly has power * * * to regulate occupations by license, and to compel, by imposition of a fine, payment of a reasonable fee, where a special benefit is conferred by the public upon those who follow an occupation, or where the occupation imposes special burdens on the public, or where it is injurious to, or dangerous to, the public."

The court in its decision, at page 75, further says that the ownership of the streets is in the city, and the duty is imposed to keep them open, and free from nuisance. That this involves the expenditure of a large amount of money, and calls for constant vigilance on all the streets, and for extensive pavements and repair thereof. If neglected, these pavements wear out and a second burden would be imposed upon the property for their repair, whether the property owner had used the street or not, and even though he had no direct agency in the destruction or wearing out of the street.

The court notices that thousands of property owners use no vehicle of any kind. Those who do use vehicles are favored ones and the court asks this question, "Why should not these favored ones pay a small sum toward making good that which they wear out?" The court in the same case recognizes that the heavier wagons and loads of course cause the greatest burden and, therefore, should pay the largest fee. It would seem, therefore, that it is proper for this court to consider in view of this case all these things in determining whether or not the ordinance, in view of all the facts, does really impose a tax for general purposes, and is not limited to the legitimate expenses incident to the regulation. And for this purpose it is proper for the court, not only to consider the ordinance providing for the license, but to consider all the purposes for which said license is available. Scarcely a day passes that some one is not injured on the streets and often caused by reason of negligence. Identity is almost impossible without the present system of tagging by number. Scarcely a day passes without reckless and fast driving and running upon the streets. Without identification and consequent punishment, and without this very regulation as to speed, the

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public at large would be greatly harmed and the vice would increase and the public be without adequate protection. The ordinance provides, among other things, that any excess of money shall be devoted to the repair of streets. This very point was raised in *Marmet v. State, supra*, and on page 68 the court says, in speaking of the act before them:

"The provision in Sec. 38, that all moneys received from licenses upon vehicles shall be placed to the credit of the street repairing fund, would seem to refute the claim that the money from this source is raised for general revenue, although it would not, necessarily, follow, even if it were required to be placed to the credit of the general fund, that the purpose of the law was exclusively the raising of general revenue, because no impediment exists to placing in one fund moneys intended for different purposes."

I feel that this case is controlling upon the court here in view of the great uncertainty as to the exact amount of money which is actually necessary for the proper regulation of the use of our streets. If the item of repair be one and the Supreme Court in *Marmet v. State, supra*, indicates positively that it is, this would effectually dispose of the contention, because that item of repair alone will amount to more than is received from the license. Just what expense the city is put to for police regulation and for the salaries of its officers and others, is in some doubt, because their duties involve, not only this regulation but other breaches of law besides. Indeed the case of *Marmet v. State, supra*, it seems to me, disposes of every contention made by the various counsel in this case as to the unconstitutionality of this ordinance and as I said on a former hearing of this ordinance, I feel bound to follow that case, and whatever objection counsel may have to the syllabus and dicta of that case, must be raised in that court as this court should to follow it.

It now remains to be determined to whom this ordinance applies. Taken literally the language makes no exceptions and applies to every vehicle which may be used on the streets. Does the license feature of these regulation ordinances apply to nonresidents of the city? In approaching a question of this kind it is always well at the very beginning to ask the simply plain question, What is right, just and reasonable? It being the intent of the law to exercise and dispense justice and equity, the answer to such a question will be found close to the law. Thus in answer to this question it seems conceded that a person traveling from New York to Indianapolis in a vehicle would not be required to stop at the outskirts of the city, walk to the city hall and obtain a license, then return to propel his vehicle through the city. Likewise the same notion would prevail with regard to the man who drove down from an adjoining county once a year. If this be true it would likewise apply

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to the man who came to the city twice a year. At what point can anyone say the line should be drawn? Manifestly at no point. If the person who comes to the city twice a year is exempt, it follows that he who comes four times a year would likewise be exempt. If one be exempt, all are exempt, and the converse of this proposition is equally true, that if we hold this license to apply to one person residing outside the city, it must apply to all. In deciding upon this branch of the case and which is raised by case number 51881, we must first consider the nature of our political subdivisions, beginning with the federal government, thence into states, thence into counties, thence into townships, and thence into municipalities.

One of the fundamental principles underlying this political structure, and which is recognized because of its sound foundation, is that of free and unlimited intercourse between these various subdivisions. No city shall build a wall barring out visitors from other cities without cause or reason. If a driver should attempt to travel from Circleville to Delaware, and if each municipality had exercised the same right of requiring a license fee the one trip would probably amount to confiscation of his vehicle since he would pass through so many municipalities in even so short a distance. There is no question whatever that all persons, residents and nonresidents, must comply with all the regulations with reference to the use of the streets. A nonresident has no more right to use a smaller tire with a heavy load than required of the resident. They are not permitted to propel their vehicle any faster than the residents. They must comply with all such regulations. The question is, whether or not a municipality must not itself furnish the money to carry out its own police regulation in this regard. The distinguishment, therefore, lies, not with any unequal application of the various regulations of the use of the street, that must be uniform to all persons alike, residents and nonresidents; but the question is, as to the payment of the cost of this regulation. To permit a municipality to exact a license fee from outside owners would not be much different from taxing them to help support the police and other officials of the city.

When we take into consideration that each person has a residence somewhere and is compelled to pay the burdens of regulations of all kinds in his own township or municipality, the justice of a rule which forbids any other municipality or township from compelling him to help pay their burdens becomes apparent. Moreover it is well settled that in construing all ordinances requiring and exacting licenses they must be reasonable, not unjust, not confiscatory and not prohibitive. The determination of what constitutes reasonableness or unreasonableness lies as a last resort in court, and it is the court's function to determine that fact. The power of this court, therefore, to so determine in regard to the application of this ordinance is unquestioned, and it hardly re-

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quires the second statement to follow this, that if this ordinance was intended to apply to nonresidents of this city, it would be unreasonable, unfair and unjust.

The residents of this city expect to exercise the right and will continue to exercise the right of driving over the roads which are supported by the farmers and to drive over the streets of the adjoining municipalities which are supported by those citizens. If this court should hold to the contrary, the further reason would then appear in that the right of all other municipalities to enact the same ordinances would result in a practical prohibition of intercourse and even as I have before indicated a confiscation. One day's travel with an ordinary horse and buggy or automobile would be sufficient to demonstrate this last proposition. I have not any hesitancy, therefore, in saying that, either upon the grounds of public policy, or on the grounds of the prohibitive character, or on the ground of unreasonableness or unfairness or injustice this ordinance cannot be construed to embrace nonresidents of the city of Columbus. Such a construction would make the ordinance absolutely unconstitutional and invalid.

In case number 51881, a permanent injunction will be issued in favor of L. L. Pegg and those joined with him as plaintiff as prayed.

In the other two cases the finding and judgment of the court will be in favor of the defendants, and those actions dismissed at the costs of plaintiff.

Exceptions will be noted for all parties and the appeal bond for each fixed at \$100.

HEALTH—MUNICIPAL CORPORATIONS.

[Cuyahoga Common Pleas, December 22, 1906.]

J. L. STADLER V. CLEVELAND (CITY).

POWER OF CITY TO TAKE THE CARCASSES OF DEAD ANIMALS.

A city may, in the exercise of the police power, take possession of all dead animals that have not been slaughtered for food, or may grant a monopoly for the taking, transporting and utilizing of such carcasses.

[For other cases in point, see 5 Cyc. Dig., "Health," § 47.—Ed.]

[Syllabus approved by the court.]

E. J. Hart and W. H. Boyd, for defendant.

N. D. Baker, Wilcox, Payer, Wilkins and Carey, city solicitors, for defendants.

BEACOM, J.

Plaintiff [J. L. Stadler, doing business as J. L. & H. Stadler] has for many years owned and operated a rendering and fertilizer plant

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and business within the city of Cleveland and now owns and operates the same. The petition says that,

"As a necessary incident to said business, plaintiff buys the carcasses of dead animals from the owners thereof in and about the city of Cleveland and removes the carcasses of the dead animals to his plant; that plaintiff is, and at all times mentioned in the petition has been, well equipped for handling the carcasses of dead animals in a sanitary and proper manner, and he does not buy, transport or handle any animals the carcasses of which have become decayed, putrid or offensive; and that in the transportation and handling said carcasses he has at all times complied with the rules and regulations of the board of health of said city."

The defendants are the city of Cleveland, a municipal corporation, its superintendent of police, the members of its board of public service, and its health officer.

The plaintiff complains of the defendants that they have been and now are interfering with him in the conduct of his business by refusing to permit him to take possession of and to transport to his premises dead animals purchased by him, and that they have, at various times during the past year, unlawfully taken such dead animals out of his possession, they being his own private property, and that they are continuing so to deprive him of possession of these carcasses of which he is the owner, and that they threaten to continue this course of conduct toward him. Plaintiff prays the court to enjoin the defendants from these acts. Defendants demur. The demurrer admits that all the allegations of the petition are true.

The powers of the defendant municipality, with which we are at present concerned, are found in Rev. Stat. 1536-100 (Lan. 3102), which grants the power "to prevent injury or annoyance from anything dangerous, offensive or unwholesome," and in another subdivision of the same section which grants power "to provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal and to establish, maintain and regulate plants for the disposal thereof." Complaint having been made by petitioner against the acts of the defendant municipality and its administrative officers and a demurrer having been filed thereto, the question presented to the court for its determination is whether or not the municipality through its legislative body, the council, may, under the authority given in the statutory provisions just cited, grant to the defendants authority to do the things complained of.

The presumption is, that the defendant officers are acting within the scope of their powers—that is, that the council has authorized the doing of that which they are doing. Such is the presumption in their favor that is made on a demurrer, and that brings us to a consideration

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of the question whether or not the municipality has power under any circumstances to authorize the doing of the things herein complained of. As stated in argument by counsel for both plaintiff and defendants, the court is asked herein to determine whether or not the governmental power known as the police power, which includes the power to protect public health and comfort, can be exercised so as to take from the owner of a dead animal, which has not been slaughtered for food, the possession of that animal.

The subject-matter of this case is not itself a large one, but this is the kind of question that has been involved in many of the most celebrated cases that have ever been considered by the courts. It involves the consideration of the power of society over private property for the purpose of protecting the peace and morals and health of the community. A dead animal is the subject of ownership. It is property. The petitioner has carefully averred that the animals which he owns and transports and uses have not by reason of decay become a nuisance. We then are called upon to determine whether or not the municipality could provide for the taking of a dead animal immediately upon death before there is any decay or when decay is merely incipient, and depriving the owner of possession thereof.

The city may exercise the powers already referred to as given to it by the legislature of the state, and in exercising these powers it may use every means "which are plainly adapted to an end." That was the language of Marshall in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316 [4 L. Ed. 579]. Substantially the same language is used in *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318 [50 L. Ed. 204], in which it was declared that where "a regulation enacted by competent public authority avowedly for the protection of the public health has a real, substantial relation to that object, the courts will not strike it down." The mere declaration by a legislative body that a certain thing shall be done to attain a certain end is not conclusive that it is adapted to that end. The courts always have power to determine whether or not the method sought to be used by the legislative body is "plainly adapted to the end."

The end sought to be attained by any legislation authorizing the doing of the things complained of in this petition would be the protection of public health. If the municipal council should determine that the granting a monopoly in the taking possession of, and hauling away, and making use of, dead animals was reasonably necessary in order to prevent their becoming a public nuisance, and if a court should be of opinion that such a provision was reasonably adapted to the end sought to be attained, to wit, the protection of the public health, then such exercise of the police power would be a valid exercise.

In the celebrated *Slaughter House Cases*, 83 U. S. (16 Wall.) 36

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[21 L. Ed. 394], the legislature of Louisiana had granted a monopoly to a company to do all the slaughtering of animals within a certain territory including New Orleans and provided that animals should not be slaughtered in any other place than in those provided by the corporation to whom the monopoly was given, and the Supreme Court of the United States declared that this "was a police regulation for the health and comfort of the people * * * within the power of the state legislatures" and further said that,

"The parliament of Great Britain and the state legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class."

In *California Reduction Co. v. Sanitary Reduction Works*, *supra*, pages 316, 318, the facts were in substance these:

The city council of San Francisco passed an ordinance granting to certain persons "the sole and exclusive right and privilege for a term of fifty years to cremate and destroy, within that city and county, dead animals, etc." The court declared that the city did have "full authority for the board to make and enforce, * * * such reasonable sanitary and other regulations as * * * have for their object the preservation of the public health." An ordinance based upon reasonable grounds for the cremation of refuse at a designated place as a means for the protection of the public health is not a taking of private property for public use without compensation. The exclusive privilege granted to a company to dispose of the garbage in the city and county of San Francisco, held not void as taking the property of householders for public use without compensation. "Municipal bodies under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate for the protection of the public health. * * * Equally well settled is the principle that, if a regulation enacted by competent public authority avowedly for the protection of the public health has a real, substantial relation to that object, the courts will not strike it down."

As to the reasonableness of the granting of a monopoly as a means of attaining the end sought, to wit, the destruction of garbage and refuse and dead animals, the court says, page 320, "nor can we say that the mode adopted for the suppression of the evils in question was arbitrary, or did not have a real, substantial relation to the protection of the public health." The court adjudged that the ordinance was not invalid.

I am, therefore, of opinion that the defendant municipality does have the power to grant a monopoly for the taking and transporting and utilizing dead animals that have not been slaughtered for food. What provision the city has made therefor I do not know, and it is not

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necessary to know for the purposes of this case, argued, as it has been, upon demurrer. The court is only called upon to determine whether or not the powers which plaintiff complains the defendants are seeking to exercise could, under any conditions, be exercised, and this court being of opinion that they might be exercised in case the municipal council has passed or should pass appropriate legislation, the demurrer is sustained.

Plaintiff excepts.

EVIDENCE—NEGLIGENCE—RAILROADS.

[Delaware Common Pleas, 1906.]

ALBERT RAWLINS, ADMR. V. HOCKING VALLEY RY.

PRESUMPTION OF NEGLIGENCE FROM INJURY BY DEFECTIVE MACHINERY.

Revised Statute 3365-21 (Lan. 5425) providing a rule of evidence as to negligence of a railroad company in inspecting its engines, does not change the rule as to what constitutes negligence, but raises a presumption of negligence of the company to so inspect on proof of an injury resulting from defective equipment, which presumption the company must overcome by direct proof of the use of such reasonable precaution as a person or company of ordinary prudence would use for the safety of its men, under such circumstances.

[For other cases in point, see 4 Cyc. Dig., "Evidence," §§ 521-546; 6 Cyc. Dig., "Negligence," §§ 539-541.—Ed.]

[Syllabus approved by the court.]

MOTION for new trial.

Pugh & Pugh, F. S. Monnett and W. B. Jones, for plaintiff.

C. O. Hunter and Marriott, Freshwater & Wickham, for defendant.

SEWARD, J.

This case [Albert Rawlins, administrator of estate of William A. Rawlins, deceased, v. Hocking Valley Railway Company], is submitted to the court upon a motion for a new trial on the grounds of errors in the charge of the court:

1. As to a charge given by request of the defendant.
 2. That the court gave an erroneous instruction in the general charge upon the same subject as the instruction given at the request of the defendant.
 3. That the court erred in refusing to give an instruction requested by the plaintiff upon the question whether the decedent was in his proper place when he was killed.
 4. Because there is not sufficient evidence to sustain the verdict.
- The first error complained of is in regard to the duty to inspect.

Rawlins v. Railway.

That portion of the charge in this respect against which complaint is made is substantially as follows:

The duty of the defendant to inspect its engine and attachment is a duty for the exercise of reasonable and ordinary care only, and requires only such tests and examinations as are reasonable and practicable, and that duty is satisfied when the company uses such reasonable precautions as a person or company of ordinary prudence would use for the safety of itself or its workmen and employes under the circumstances and the nature of the enterprise in which they are engaged. If this proposition does not correctly state the law of the case, then this motion should be sustained.

The portion of the proposition attacked is that which states when the duty is satisfied. The court said to the jury that the duty to inspect is satisfied when the company uses such reasonable precautions as a person or company of ordinary prudence would use for the safety of its workmen and employes under the same circumstances.

The court charged the jury that inspection was required, and to what extent the inspection was required in order to remove the presumption of negligence which arises upon proof of the injury and the fact that it resulted from the defect in the attachment.

The basis of the action is negligence, and the action is brought under favor of the act of April 2, 1890 (87 O. L. 149; Rev. Stat. 3365-21; Lan. 5425), which provides, in substance, that,

"If the employe * * * shall receive any injury by reason of any defect in any car or locomotive, * * * such corporation shall be deemed to have had knowledge of such defect before and at the time such injury so sustained, and when the fact of such defect shall be made to appear in the trial * * * the same shall be *prima facie* evidence of negligence on the part of such corporation."

This statute does not change nor vary the rule as to what constitutes negligence; it neither takes from nor adds to that rule, but it does change the rule of evidence in the trial of such cases. Before its enactment, it was necessary for the plaintiff to prove there was want of ordinary care on the part of the defendant, together with the other facts necessary to make his case; but under this enactment he is only required to establish the injury, and that it resulted from the defect, at which point the statute steps in and attributes knowledge of the defect to the defendant, and says, *prima facie*, that it was guilty of negligence; but it does not change the fact that negligence is the want of ordinary care, or enlarge upon what had theretofore constituted ordinary care. That is, as the court views it, ordinary care is the rule under this statute; and after the plaintiff has introduced evidence making his *prima facie* case, the defendant, in order to overcome the presumption, is only required to show that there was no want of ordinary care.

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It is claimed that this theory of the law as given to the jury is not consistent with certain charges given at the request of the plaintiff, in which the court said:

"That in order to overcome the presumption of knowledge of the defect, an actual and proper inspection must be made. Further, that an actual inspection must be made by inspectors in order to remove the presumption."

If by this is meant that the inspection must be made by a professional inspector whose sole business it was to make such inspection, then the proposition is stronger than the defendant was entitled to have it. A proper inspection by a competent person, qualified to pass upon the condition of the attachment, would be a compliance with the law.

It is also claimed that the paragraph in the general charge which reads, "The company is not required to adopt extraordinary tests for discovering defects in machinery which are not approved, practicable and customary, but that it fulfilled its duty in this regard if it adopted such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances;" does not correctly state the law. It involves the same question which I have before referred to. It is claimed that the proposition abrogates the distinction between a rule of evidence and substantive law. Suppose the court had said to the jury that if they found from the evidence that the company used ordinary tests for discovering defects in the attachments, which are customary, practicable and ordinarily used by prudently conducted companies engaged in like business and under like circumstances, would that not have stated the law in the case? The court thinks it would.

As to the third and fourth grounds of the motion, each involve a consideration of the evidence adduced; the third as to the testimony concerning the knowledge of the decedent of the rules of the company; the fourth as to the evidence of inspection made. The court was satisfied at the time that some evidence was introduced, tending to show that the defendant had knowledge of the rules, and that inspections were made. This case was tried in March, 1906, and the argument of the motion for a new trial was submitted about September 1, 1906, so that I do not pretend to recall just what the evidence on these points was. The motion for a new trial may be overruled and exceptions noted.

As to the compliment of counsel, as to the manner in which the charge was delivered, it is of no significance, for, although it were delivered with the tongues of angels and with the logic of Paul the apostle, yet, if it failed to correctly state the law, it is as sounding brass and tinkling cymbal.

Gell v. Lehr.

VENDOR AND PURCHASER.

[Cuyahoga Common Pleas, December 15, 1906.]

JACOB GEIL, JR. v. L. G. J. LEHR.

LIABILITY OF PURCHASER FOR RENT AFTER DEFAULT IN INSTALLMENTS.

A purchaser of land on a land contract providing for the payment of the consideration, in installments, having defaulted in his payments, and the vendor given notice to quit the premises is not liable to the vendor for rent for the period between the notice to quit and the time purchaser actually left the premises; the relation of landlord and tenant does not exist between them.

[For other cases in point, see 5 Cyc. Dig., "Landlord and Tenant," §§ 5-10, 420-438; 7 Cyc. Dig., "Use and Occupation," §§ 1-13.—Ed.]

[Syllabus approved by the court.]

C. W. Swartzel, for plaintiff.

N. S. Good, for defendant.

BEACOM, J.

Plaintiff sued defendant in a justice court for rent and attached property of defendant under authority of the statute authorizing attachment where the claim is for necessities. The facts are these:

Plaintiff and defendant executed a land contract, by the terms of which plaintiff agreed to sell and defendant to buy a house and lot in the city of Cleveland, payment therefor to be made in installments, deed to be given upon full payment of purchase price. Defendant entered into possession of premises, made a small payment thereon but failed to make his payments as stipulated in the contract. Thereupon about the tenth day of a certain month plaintiff entered upon the premises, asserted his right to possession and gave defendant notice to quit premises. After remaining a short time longer, defendant voluntarily left the premises, and this action is brought to recover reasonable rental for the period that elapsed between the time when the owner entered the premises and ordered the defendant to leave and the time when he did actually leave, and that raises the question as to the relative rights of the parties hereto in said lands during said time.

Plaintiff claims that by entering upon the premises and demanding possession defendant became his tenant and obligated to pay rental for whatever time he remained. Defendant claims that he had an interest in said premises of which he could be deprived only by a court of competent jurisdiction declaring his interests forfeited. Plaintiff relies upon the following provisions in the contract:

"In case default shall be made by the party of the second part, his heirs, executors, administrators or assigns, in any of the conditions above stipulated to be performed by him, it shall and will be lawful for

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the party of the first part, if he so elect to treat this contract as thenceforth void, and to re-enter upon said premises at any time after such default, without serving on the party of the second part, or any person holding under him a notice to quit said land; and in case this contract shall be treated as thenceforth void, the party of the second part, or those claiming under him, shall thenceforth be deemed mere tenants at will under the said party of the first part, and be liable to be proceeded against without notice to quit under the provisions of the law regulating proceedings in cases of entry and detainer."

The conclusion of the court in this matter is, that there was no perfected forfeiture or rescission of the land contract by the mere service of notice on the contractee, nor until the forfeiture had been declared by a court of competent jurisdiction, or until possession was secured by the holder of the legal title. It may very well be, that equity will not aid the purchaser to secure a full, legal title, by a decree of specific performance, if he is in default and the seller has merely served notice of his intention to terminate the contract; the purchaser nevertheless, has a species of title by the very fact of possession (originally lawful), until terminated, either (1) by mutual covenant, or (2) by surrender of possession, or (3) by decree of a competent court.

It may not be necessary to decide this point in this case, however. The action was brought for use and occupation of the premises, as by a tenant. The circumstances clearly repel any such relation between the parties.

"If the occupant enter and hold without permission or right, he is a trespasser; and the owner cannot waive the trespass and make him his tenant without his consent." *Peters v. Elkins*, 14 Ohio 344.

"An action of assumpsit for use and occupation, or on the money counts, cannot be maintained, where possession is held adversely under claim of title." *Cincinnati v. Walls*, 1 Ohio St. 222, 223.

"Where a parcel of land is occupied by a person not the owner, in such manner and under such circumstances that a contract to pay rent cannot, in law, be implied, rent for such occupation cannot be recovered." *Mitchell v. Pendleton*, 21 Ohio St. 664.

If, therefore, the claim of plaintiff as to forfeiture of the contract by mere service of notice were correct, that fact alone would not give him a right to recover for use or occupation of the premises, in the absence of some contract by the purchaser, express or implied, to pay same, or some assent on his part to be regarded as a tenant from that date. Without such assent he was at most a trespasser holding the land under a claim of title.

Attachment discharged. Plaintiff excepts.

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ATTACHMENT AND GARNISHMENT.

[Hancock Common Pleas, August 1, 1906.]

*C. F. KING v. J. M. LAWS.

ORDER GIVEN AGAINST WAGES COVERING PERIOD GREATER THAN THIRTY DAYS NO BAR TO ATTACHMENT FOR NECESSARIES, AGAINST WAGES EARNED AFTER SAID THIRTY DAYS.

An order given against his wages by a debtor to his creditor for necessities furnished, covering a period greater than thirty days, will not defeat an attachment for necessities, against his wages earned beyond said thirty-day period, under the provisions of Rev. Stat. 6501 (Lan. 10078).

[For other cases in point, see 1 Cyc. Dig., "Attachment and Garnishment," §§ 205-213.—Ed.]

[Syllabus by the court.]

ERROR to justice of peace.

J. W. Grimm and R. J. Wetherald, for plaintiff in error.

Franks & Franks, for defendant in error.

DUNCAN, J.

This is a proceeding in error from a justice of the peace. The case below was one in attachment of wages under the provisions of Rev. Stat. 6501 (Lan. 10078), known as the 10 per cent law. On February 22, 1906, the plaintiff, King, brought suit against the defendant on a bill for necessities furnished and sued out an attachment and garnished his wages due from the board of education of Union township. The defendant moved the court to dissolve said attachment upon the ground that 10 per cent of his wages was then and at that time being retained by said board in payment of an order for necessities, given to another.

Upon the hearing of this motion, it appeared that the defendant was a married man, etc., and that theretofore, on January 3, 1906, he had given an order on said board for necessities to one L. B. May for the sum of \$53.40, payable in four equal monthly installments of \$13.35 each, two of which had already been paid. Upon this showing, the justice granted said motion and dissolved said attachment. Was this right?

Revised Statute 6489 (Lan. 10066) sets forth the several grounds of attachment in actions before justices of the peace. By this section it is provided that, for any claim for which judgment is sought for work or labor or for necessities, an attachment may issue without specifying any other ground. *K. B. Co. v. Batie*, 25 O. C. C. 482. The question then, is simply one of exemption. In this behalf it is provided by Rev. Stat. 5430, 5441 (Lan. 8958, 8970) that the personal earnings

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of the debtor, head of a family, for three months prior to the attachment are exempt, if necessary for the support of himself and family, except where the claim sued on is also for necessities; in which case 90 per cent only, is exempt. It may be conceded to be the law, that the general exemptions provided by said last two sections are exemptions which apply in favor of the debtor as against any and all creditors against whom the debtor may wish to claim them. And as the 10 per cent of the debtor's personal earnings made liable to attachment under the provisions of said Rev. Stat. 6501 (Lan. 10078) on a claim for necessities is merely an exception to the amount of the general exemption in favor of a claim of this character, it must follow that the 90 per cent remaining is also exempt as to any and all creditors against whom this claim is made.

The question then is, Does said order given by the defendant to May, defeat this attachment?

In construing statutes, it is well to remember that they are enacted to some purpose and that it is the duty of the courts to give that purpose force and effect whenever and wherever a case may arise, comprehended within its terms, to the end that the intention of the legislature may be carried out. The purpose of said Rev. Stat. 6489, 6501 (Lan. 10066, 10078) was to provide a remedy in favor of a creditor furnishing necessities to an insolvent debtor unwilling to pay—a remedy by which the debtor may be required to pay that which he would otherwise neglect to pay. This being the purpose of the legislature, it is the duty of the courts to regard strictly every voluntary act of the debtor, whereby that purpose may be evaded or defeated. The act itself provides the conditions by which it declares its purpose may be satisfied. They are:

First. That 10 per cent of the debtor's personal earnings, plus four dollars shall have been attached; and,

Second. That the creditor shall have served a written demand upon the debtor for the said 10 per cent, and, as a result, he tender the money or a duly accepted order therefor.

A partial satisfaction is also provided for by this section to the effect that where the debtor has voluntarily paid his creditor any part of his said claim within thirty days of such demand, the same shall be considered and held as a part of said 10 per cent so liable to be attached.

It will easily be observed that defendant's said order to May does not come within any of the above provisions, and the conditions under which it is provided said purpose may be satisfied having been named in the statute, it follows that all other conditions have thereby been excluded, under the old maxim: "*Expressio unius est exclusio alterius.*"

Again, it may be said that the statute itself, Rev. Stat. 6501 (Lan. 10078), provides that no demand or attachment shall be made by the same creditor at closer periods than thirty days, and then only for the

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10 per cent of wages earned during the interval of thirty days. This, we have seen, excludes all other creditors for the same period, and the creditor not being in a position to demand more, either by way of per centum or period during which the wages are earned, it must follow that an order made in his favor for 10 per cent or more of the debtor's wages for a period greater than thirty days exceeds the limitations fixed by the statute and can be of no greater force or operation than one which falls within its provisions. This being so, it must also follow that the debtor cannot give his creditor for necessities an order on his employer for 10 per cent of his current wages for two or more months and thereby defeat the lien of an attaching creditor for necessities upon 10 per cent of the debtor's wages earned beyond the thirty days interval. To hold otherwise would be to place the operation of the statute within the power of the debtor, when it belongs to the creditor; to point out a way by which the legislative intent may be defeated and to open the door to fraud, and thereby defeat the ends of justice.

I, therefore, hold that the justice erred in dissolving said attachment; and it is ordered that the said justice cause to be paid into his court and applied on plaintiff's said judgment the 10 per cent of said wages so attached, plus four dollars, to be applied on the costs of said attachment, as provided by said statute.

It is further ordered that the defendant pay the costs of this proceeding, for which execution is awarded.

INJUNCTIONS—WATER AND WATER COURSES.

[Licking Common Pleas, April Term, 1906.]

CHARLES C. WELLS v. LEMUEL H. WHITE.

BREACH OF CONTRACT TO SUPPLY WATER MAY BE ENJOINED.

A contract having been made by plaintiff with township trustees, for the use of the surplus water from an artesian well on a school lot, under which contract plaintiff piped the water to his own land and used it for twenty years, a subsequent board of trustees will be enjoined from disconnecting the pipes and diverting the water from plaintiff's land, to his injury.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 2844-2860; 5 Cyc. Dig., "Injunction," §§ 479-488.—Ed.]

[Syllabus approved by the court.]

Norpell & Norpell and Kibler & Montgomery, for plaintiff.

J. R. Fitzgibbon, for defendant.

SEWARD, J.

The question involved grows out of a petition to enjoin the township trustees from shutting off certain water. The facts in the case, as shown by the petition, are about these:

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The township trustees put down a well on a school lot, and it turned out to be an artesian well; it threw water some twelve feet high above the surface of the ground. The petition alleges that the then trustees made an agreement with the plaintiff, Wells, by which he was to conduct the water across the road to a certain watering trough, that he was to put in the pipes and they were to make connection with the pipe, and he was to have the surplus water. He dug the trench and put in the pipes, and they made the connection, and the surplus water was conducted across the road to his watering trough. That was more than twenty years ago. This petition alleges that this agreement was made with the township trustees. Recently, in 1904, I believe, the trustees then in office disconnected the pipe and took the water to some other place, it is said to a brother of one of the trustees, and deprived the plaintiff, Wells, of the right to that water. The court held the other day that as this petition alleged that this was done under an agreement, that Wells had gone to the expense of putting in the pipe and conducting the water across the road to his watering trough, that he had some rights under that agreement if the agreement was properly made and entered into.

Something was said in argument about a natural water course; the court thinks that the natural water course was under the ground; it was the duty of the trustees, as the court announced, to take care of that surplus water, so it would not damage any of the surrounding landowners, and they made that provision for taking care of the water.

In the brief furnished to the court, it is claimed that this is for specific performance of a contract. The court doesn't view it. The contract has been made and entered into. It is to prevent the trustees from interfering with rights under the contract which was executed and went into operation. To put a strong case, suppose that this plaintiff had sought that water for the purpose of establishing a brewery there, or a tannery. Water is necessary for carrying on a tannery, as is well known. And suppose that after this contract was made for the surplus water, the plaintiff in this action had built a tannery and had gone to considerable expense to use that water, and under a contract with the trustees, and the trustees should turn it off and conduct it to some one else. Could anyone suppose that the plaintiff would not have a right to enjoin interference with the water that he obtained under that agreement? The court thinks not.

The court is cited to *Steinau v. Gas Co.* 48 Ohio St. 324 [27 N. E. Rep. 545]. This is a case where a contract was made with Steinau, by which Steinau was to take gas from the gas company in Cincinnati for a period of ten years, and he contracted and agreed that he would not use any other lights, oil lamps, or electric lights, if it should become popular to use them. He was not to use anything of that kind, and

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was to use their gas. He went to the expense of equipping, and he was to pay \$1.75 a thousand for the gas consumed, less 10 per cent, I believe. He disregarded his contract, and the gas company got out an injunction against his using electricity and not using their gas, and the injunction was dissolved, and that holding was sustained by the Supreme Court. The Supreme Court say, at page 331, the old edition:

"It seems plain that, if the situation of the parties were reversed, and specific performance were sought against the company, the court would have no power to compel a full compliance by the company with its stipulations to furnish all the gas needed for the period provided for in the contract. It might be in the power of the court to enjoin the company from turning the gas off from Steinau's service pipes so long as he complied with its reasonable rules and regulations."

So the Supreme Court, while it is not a point decided in this case, by *obiter dictum* say that it might be in the power of the court to enjoin; just as in this case it is in the power of the court to enjoin the turning off of this water.

FRAUDS, STATUTE OF.

[Cuyahoga Common Pleas, November 24, 1906.]

LOUIS DOMINICK V. JAMES KANE AND MOLLIE KANE.

ADMISSIBILITY OF PAROL EVIDENCE OF A VERBAL LEASE OF REAL ESTATE.

Possession of real estate by a tenant, under a parol lease for one year, takes the contract of lease out of the statute of frauds, and the exclusion of parol evidence of such verbal agreement is prejudicial error.

[For other cases in point, see 4 Cyc. Dig., "Frauds, Statute of," §§ 89-92.—Ed.]

[Syllabus by the court.]

ERROR to justice of the peace.

Bemis & Calfee, for plaintiff in error.

O. W. Broadwell, for defendants in error.

BEACOM, J.

This is a proceeding in error, seeking to reverse a judgment granted by a justice of the peace, in favor of defendants in error herein, in a forcible entry and detainer proceeding. There is no dispute about the facts. In May, 1906, plaintiff in error herein became the tenant of defendant in error herein, taking possession of and occupying, from that time until the forcible entry and detainer suit was brought in the justice's court, a certain dwelling house in the city of Cleveland. No writings were had between the parties. Whatever their contract was it existed only by parol agreement and the fact of possession by plaintiff in error. Plaintiff in error sought to show, this proceeding having been

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brought about six months after their occupancy began, that, before possession of the premises was taken, conversations were had between plaintiff and defendants, of such a character that a parol lease for one year was agreed upon. The justice excluded this evidence. It is clear that if this evidence was wrongfully excluded then such exclusion was prejudicial. If the evidence had been admitted it would have tended to show that the parties had agreed upon a lease for a year and that the proceedings by the landlord in forcible entry and detainer could not be maintained.

Revised Statute 4106 (Lan. 6780) provides, in substance, that a lease of lands must be signed by the lessor and acknowledged by him and witnessed. Revised Statute 4112 (Lan. 6786) excepts from the provisions of Rev. Stat. 4106 (Lan. 6780) leases not exceeding three years, if accompanied by possession.

The statute of frauds, Rev. Stat. 4198 (Lan. 6900), provides, in addition to the provisions of Rev. Stat. 4106 (Lan. 6780), that no interest in real estate can be granted except by writing. If we had only the rule of the statute of frauds, then this provision would determine this present proceeding in favor of defendants in error, but soon after the enactment of the statute of frauds it was declared by the courts that this legislation, intended to prevent fraud, should not be used as an instrument for its perpetration. In pursuance of this principle, it was held that where the provisions of a parol lease for a short period did not exist solely in men's minds and memories but was evidenced by the open and notorious fact of the lessor's having been placed in possession, then, in that case, this manifest act of possession was declared to have taken the case out of the statute of frauds. The statute provides absolutely that nothing can be granted except in writing, but the courts early held that this provision did not apply in a case where something had been done of such a character that the party did not rely for evidence of his rights solely upon parol testimony but did rely partly upon the open and manifest physical act of possession.

Likewise in this state the courts have in clear language held that partial performance may take a case out of the statute of frauds and that delivery of possession on a parol lease not exceeding three years is sufficient for that purpose. This has been held in numerous cases, among others, in *Grant v. Ramsey*, 7 Ohio St. 157, 158. In paragraph 2 of the syllabus, it is said that,

"A parol lease of lands for more than one year, but less than three, will, by the taking possession under it, and the payment of rent according to its terms, be withdrawn wholly from the operation of the statute of frauds."

We find, then, that although our statutes provide that an interest in real estate can be granted only in writing, and further that it can be

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granted only in writing signed and acknowledged by the lessor and witnessed, yet it is settled law in this state that a lease, not exceeding three years, accompanied by possession, is taken out of the statute of frauds, the possession being deemed, for a lease of short duration, the substantial equivalent, in its evidential character, of a written instrument.

Judge Swan has, on pages 576 and 577 of his Treatise, stated substantially the same thing in this language:

"If a lease is not in writing, but a mere verbal contract, it is binding on both parties, provided the tenant took possession under it, precisely as if it was executed according to the prescribed rules of the statute."

This, then, appears to be the situation herein:

If that lease made by word of mouth for a period not exceeding three years is good, it is good because of the existence of the two facts: First, the oral agreement; and second, the taking possession. Those are the facts which establish the existence of the right of the tenant to occupancy, and since those are the facts which constitute the foundation of his rights, he must be permitted to introduce evidence of those two facts in order to establish his rights. If, in the language of Judge Swan, "it is binding on both parties precisely as if executed according to the statute," then the elements, to wit, the parol agreement and the possession, which together constitute the evidence of a right to enjoyment of possession, can both be shown in a court by evidence exactly as the written instrument might be introduced in evidence, if such instrument existed.

If such evidence could not be introduced, we arrive at the absurd position that the law says that the tenant who has possession under a parol agreement for possession for a period less than three years has a perfectly valid lease, but that, if the landlord brings a proceeding in forcible entry and detainer, the tenant cannot be permitted to introduce the only possible evidence of a parol agreement, to wit, parol evidence. The lease is in theory as good as a written lease, but if the contention of defendant in error herein be true, then the only possible evidence that could exist to substantiate the claim of plaintiff is excluded. That appears to this court to be a reduction to an absurdity. It is the equivalent of saying that a parol contract is perfectly good but that its provisions must be proved by something other than parol, which is a manifest reduction to an absurdity.

Defendants in error rely upon *Carey v. Richards*, 2 Dec. Re. 630, 635 (4 W. L. M. 251). That case doubtless does hold to the theory that while such parol evidence might be introduced in a court of equity, it cannot be introduced in court of law. What substance can exist in that language this court is unable to see. That decision was made nearly

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half a century ago by a common pleas court of this state and is binding only upon this court insofar as its reasoning appeals to the judgment of this court, and its reasoning does not appeal to the judgment of this court in any degree. Moreover, an examination of this case will show that, in order to arrive at the conclusion therein arrived at, the distinguished judge who announced the opinion found it necessary to criticize certain decisions of the Supreme Court and to assert that they had been decided by only two judges and not by a full bench.

Therefore, I am of opinion that in a forcible entry and detainer case or in any other kind of a case or proceeding in a court that has jurisdiction of the subject-matter, it is sufficient to show that a lease of lands for a period not exceeding three years, if accompanied by possession, was made without writings but was made by parol, and that the terms of said parol lease may be shown by evidence of the parol agreement of the parties.

Judgment reversed. Defendants in error except.

MUNICIPAL CORPORATIONS.

[Cuyahoga Common Pleas, November 24, 1906.]

MARGURITTE L. HUTCHINS v. CLEVELAND (CITY).

RIGHT OF COUNCIL TO REGULATE MANNER OF MEASURING CITY WATER.

The city council having provided regulations for the measurement of city water used by consumers, the board of public service cannot adopt some other method of measuring such water, and any deviation by the board from the council's rules may be enjoined.

[For other cases in point, see 5 Cyc. Dig., "Injunction," § 590 *et seq.*]

[Syllabus approved by the court.]

W. S. Fitzgerald, for plaintiff.

N. D. Baker, C. J. Estep, H. Payer, W. D. Wilkins and W. A. Carey, city solicitors, for defendant.

BEACOM, J.

Plaintiff owns a lot in the city of Cleveland, on which is situated a dwelling house. The council of said city passed an ordinance providing, for the purpose of determining the amount of water used, that the board of public service might, at its discretion, meter buildings other than residences. Said ordinance provided further that,

"Residences shall be metered only on request of the consumer, provided that in case of waste or other improper or unauthorized use of water, of which satisfactory proof has been furnished to the meter department, a meter may be set without the consent of the consumer."

Plaintiff alleges that the board of public service, defendants herein, are about to install a water meter upon her premises without her consent

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and against her will, and she further alleges that she has neither wasted water nor made any improper or unauthorized use of the same, and that no proof of any kind of such waste or improper or unauthorized use of water has been furnished to the meter department. She further alleges that the defendants are without authority to install a meter upon her premises against her consent, and she asks that the court enjoin them from so doing.

To this petition a demurrer is filed, and it is conceded that the only question for the court to determine is, whether or not the board of public service, defendants herein, have power to install water meters except as authorized by ordinance of the council. In other words, the question is, whether or not the council and the council alone can provide rules and regulations as to when and where meters shall be installed, or, Does the board of public service have that power? The defendants found their claim to this power upon the provisions of Rev. Stat. 2411 (Lan. 3685; B. 1536-522), in which it is provided that,

“For the purpose of paying the expenses of conducting and managing the water works * * * the trustees or board shall have the power to assess and collect from time to time a water rent of sufficient amount, in such manner as they may deem most equitable.”

Defendants say in their brief in pursuance of this claim that,

“The board of public service has the right to determine how it will assess water rents; that the installation of water meters is a mere mechanical device for the assessment and ascertainment of water rents; that the discretion of the board of public service, with regard to such services, cannot be controlled by the council.”

This is the claim of defendants.

The court will not consider the question of whether or not the powers granted to boards of water works trustees by former Rev. Stat. 2411 (Lan. 3685; B. 1536-522) are now vested in the board of public service. In the view the court takes of this matter, it is unnecessary to examine into that question and it is sufficient to say that it is of opinion that the question can be determined by other provisions of the statutes that are less subtle and refined than the construction sought to be made of this section by counsel for defendants.

Revised Statute 1536-131 (Lan. 3923) provides, among other things, that, “In all municipal corporations council shall have the care, supervision and control of * * * aqueducts.”

Revised Statute 1536-675 (Lan. 3127) provides that the directors of public service “shall be the chief administrative authority of the city, and shall manage and supervise all public works,” etc.; and Rev. Stat. 1536-676 (Lan. 3128) provides that the directors of public service “shall supervise the improvement and repair of * * * aqueducts

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* * * and the construction of all public improvements;" and Rev. Stat. 1536-677 (Lan. 3129) provides that the directors of public service "shall have the management of all municipal water," etc.

The word "aqueduct" is doubtless used in the sense of the Latin words from which it is derived, and is intended to include all those means by which water is led from a source of supply to the user, and it is substantially equivalent to "water works." The court is of opinion that the control given to the council, the legislative body of the city, includes the power to make rules and regulations for the use of water by consumers, and that, when it passed the ordinance providing where and when water meters should be installed, it was exercising a power which the statutes of the state had given to it; that this power was a legislative power and was properly exercised by the council and could not be exercised by any other public officers.

The court is further of opinion that the board of public service, who are by the statutes "the chief administrative authority," have the power to "supervise improvements to aqueducts" and that that is the extent of their powers in the premises. They apply the rules made by the council to the subject-matter, determine the mode and manner in which the work shall be done, but can only do so within the scope of the rules provided by the legislative body, the council.

Believing that such is the relative and respective powers of the council and the board of public service, the demurrer of the defendants is overruled. Defendants except.

JUDGMENTS.

[Licking Common Pleas, April Term, 1906.]

JACOB KUHN V. HARVEY KAGEY ET AL.

VACATION OF JUDGMENT ON MOTION OF PLAINTIFF BECAUSE OF ERROR IN AMOUNT.

A judgment on a note rendered on default, omitting interest on the note for ten years because the praecipe inadvertently omitted or wrongly stated the time from which interest was claimed, although the petition stated the true amount, may, on motion by the plaintiff, be vacated that a new and correct summons may issue in a new action, but the costs resulting from such error will be assessed against the plaintiff.

[For other cases in point, see 5 Cyc. Dig., "Judgments and Decrees," §§ 1151-1155.—Ed.]

[Syllabus approved by the court.]

SEWARD, J.

This case is submitted to the court upon a motion to vacate a judgment.

A petition was filed in this court June 14, 1904, by Jacob Kuhn, guardian of Ida Lamb, v. Harvey Kagey et al., in which the pleader

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describes a certain note for \$175, with interest at 8 per cent from date, dated September 16, 1891, and asks to recover thereon. Upon that petition a praecipe was filed, in which the amount for which judgment would be taken in case the defendant did not answer was the amount of the note with interest from September 16, 1901—a loss of ten years' interest by a mistake in the figures. The defendant was in default, and judgment was taken for the amount of the face of the note with interest from 1901 instead of 1891. This motion is now made by the plaintiff to vacate and set aside the judgment.

It is claimed, the matter having gone into judgment by default, that the plaintiff has no right to have the judgment set aside and vacated, and the court is cited to *Ewing v. Clafflin*, 20 Ohio St. 315, an assessment case, where an assessment was made on certain lands for \$1,365. Suit was brought to recover \$365, by some inadvertence the \$1,000 being omitted. Judgment was recovered for \$365, and the judgment paid. Subsequently a suit was brought for the \$1,000, and the Supreme Court held that there could be no recovery—that the matter had gone into judgment, and the judgment had been paid, and that the plaintiff could not recover the excess of \$1,000 over the \$365.

This matter is governed by Rev. Stat. 5354, 5364 (Lan. 8880, 8890), as the court views it. Revised Statute 5354 (Lan. 8880) reads:

“The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which the same was made:

“1. By granting a new trial for the cause within the time and in the manner provided in Section [Lan. 8825] 5309.

“2. By a new trial granted in proceedings against defendants constructively summoned, as provided in Section [Lan. 8563] 5048.

“3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.

“4. For fraud practiced by the successful party in obtaining judgment or order,” etc.

Those are the grounds upon which a judgment can be vacated at a subsequent term upon motion. Revised Statute 5364 (Lan. 8890) provides:

“When, by mistake of the pleader, the amount claimed in the pleading, and recovered, is less than the true amount then due, the party injured by the mistake may recover the balance by civil action, without costs.”

This was evidently a mistake of the pleader, but not a mistake in the pleading. It was a mistake that the pleader made in filing his praecipe. He did not file the praecipe for enough, and of course, could not take judgment for more than is stated in the summons issued upon

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the praecipe. Is this such a mistake as can be corrected by a motion at a subsequent term?

In *Elliott v. Plattor*, 43 Ohio St. 198 [1 N. E. Rep. 222], a motion was made to set aside a sale, and a motion to confirm the sale, and the judge intended to confirm the sale, and instead of doing so he sustained the motion to set aside the sale, and the clerk entered the judgment of the court as taken from the docket of the judge, and set aside the sale. It was not the intention of the judge to set aside the sale at all, but his intention was to confirm it. The Supreme Court say:

“A motion to confirm a sheriff’s sale was granted and the sale confirmed, but, by mistake, the judge noted on the court docket that the motion was refused, and this note misled the clerk and induced him to make a like entry on the journal of the court: *Held*, that this was a mistake of the clerk as well as of the judge, which may be corrected, under Sec. 5354 [Lan. 8880], Subd. 3 Rev. Stat..”

The clerk did not make any mistake except as he entered the mistake of the judge. The judge had made the mistake and the clerk entered it just as the judge had put it on his docket, and the Supreme Court hold that that can be corrected under Subd. 3 of Rev. Stat. 5354 (Lan. 8880). The exceptions by defendant show that the oral announcement by the court of its action were just the reverse of those noted on the judge’s minutes, or at least that the defendant’s counsel so understood them.

If the judgment in the case at bar had been paid, it would put a different phase upon the question. This judgment stands, and it is not the defendant who is trying to open up the judgment, but it is the plaintiff. He wants to vacate and set aside that judgment. It would be equitable that he should have the right to set up his claim correctly, and that a new summons issue upon the petition, stating the amount for which judgment will be taken, in case the defendant fails to answer. It seems to the court that that is equitable, and I cannot find anything to the contrary. It can do no injustice in the case, and the motion is sustained, and the plaintiff is to pay the costs of the original action.

Rosenthal v. Surety Co.

BONDS—PRINCIPAL AND SURETY.

[Franklin Common Pleas, May 29, 1906.]

ROSENTHAL V. AMERICAN SURETY CO. ET AL.

SUBCONTRACTOR'S RIGHTS UNDER BOND OF BUILDING CONTRACTOR.

The provisions in a bond to secure the faithful performance of a building contract that, upon default of the principal, obligee should notify the surety and retain all money due principal under the contract for the indemnification of the surety, does not, in a suit on the bond by the obligee against the surety, give to a subcontractor who has furnished materials any right, on cross petition, to claim to be subrogated to the rights of the obligee to the money retained by him nor to a right of action against the surety, there being no express provision in the bond for the protection of the material man.

[For other cases in point, see 2 Cyc. Dig., "Bonds," §§ 1110-1116; 6 Cyc. Dig., "Mechanics' Liens," § 97.—Ed.]

[Syllabus approved by the court.]

Gumble & Gumble, for plaintiff.

Page, Page & Page and Sater, Seymour & Sater, for defendants.

BIGGER, J.

This case is presented to the court upon demurrer of the American Surety Company, defendant, to the amended answer and cross petition of the defendant, Joseph Knox. The demurrer is general. In short, the defendant, the American Surety Company, became surety to the plaintiff for the faithful performance of a building contract entered into between plaintiff and defendant, C. A. Ricketts & Company.

The plaintiff alleges that Ricketts & Company failed to perform their contract in accordance with its terms and brings suit on the bond. The defendant, to whose cross petition the demurrer is submitted, it is alleged, was a subcontractor and furnished material for the erection of the building, and claims that he perfected a mechanic's lien.

One of the conditions of this bond was, that upon any default of the principal in the bond, the plaintiff, Rosenthal, should at once notify the surety company and should retain in his hands all moneys due to the principal under the building contract for the indemnification of the surety.

The defendant Knox's claim, as I understand it, is, that because of this condition in the bond he is in some way subrogated to the rights of Rosenthal against the surety company. One of the grounds upon which this contention is based is the legal principle that a contract made between two for the benefit of a third may be enforced by such third party in his own name for his own benefit. But that principle, I think, cannot be applied here for the very sufficient reason that it is evident this contract of insurance was not made for the benefit of the defendant, Knox, and other subcontractors, and, therefore, it cannot be

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regarded as a contract for his benefit made between the plaintiff and this defendant.

Stearns, Suretyship Sec. 149, says that,

"In general, a bond to secure the performance of a building contract with a covenant to pay all labor and material claims will bind the surety to pay such claims and recovery may be had at the suit of the claimants themselves."

The circuit court of Cuyahoga county, deciding the case, *American Surety Co. v. Raeder*, 8 Circ. Dec. 684 (15 R. 47), held that material men might sue upon a building contract bond which provided that the undertaking should be for the use of any material man or laborer having a just claim. But it was one of the conditions in that bond, or one of the covenants in that bond, that the undertaking should be for the use of the material men. But there is no such condition in this bond. It seems to be clearly executed solely for the protection of the plaintiff in this action and not intended for the protection of material men, such as the cross petitioner.

Now, it is doubtless true that the plaintiff could not by contract thus barter away the right which the statute gives to subcontractors to a lien upon the fund in his hands when they have complied with the statute, and if he does, under such a contract and in compliance with its terms, pay any moneys to the insurance company which the statute makes liable to the payment of the claim to Knox, the plaintiff will be liable to Knox. But under the rule of strict construction of the obligation of the surety on a bond I am of opinion this bond cannot be sued upon by material men.

Upon this same subject Stearns says, at Sec. 160, that the rule that one having a beneficial interest in a bond may sue on it "is subject to the qualification that there must be an intention of benefiting the third party to whom the promisee is under a legal obligation to do that which is called for in the bond," and cites cases in support of this rule.

Now, I find nothing in the terms of this bond to indicate that it was the intention of the parties to this bond to protect material men. I am, therefore, of opinion that an action cannot be maintained against the surety on the bond under the strict rule of construction applying to such obligations, but that, if any portion of the fund in the hands of the plaintiff made liable by statute to the payment of Knox's claim is applied to the indemnification of this surety, the plaintiff will be liable in an action to Knox and that the surety company is not liable on the bond.

The demurrer must, therefore, be sustained.

Engineering Works v. Ice & Cold Stor. Co.

CONTRACT—DAMAGES.

[Montgomery Common Pleas, February 9, 1907.]

GREAT LAKES ENGINEERING WORKS V. ICE & COLD STORAGE CO.**1. MEASURE OF DAMAGES FOR BREACH OF CONTRACT IN CONSEQUENCES CONTEMPLATED BY PARTIES.**

A construction company having contracted to complete the building of an ice plant within a certain time, is, on failure to fulfill the agreement, liable for such damages as would naturally follow such a breach of contract and may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, considering the nature and use of the building.

[For other cases in point, see 3 Cyc. Dig., "Damages," § 861 *et seq.*; 7 Cyc. Dig., "Sales," §§ 401-411, 475-482, 495-500.—Ed.]

2. AMOUNT OF EXPENDITURE NECESSITATED BY BREACH OF CONTRACT NOT SPECULATIVE DAMAGES.

When an ice company, by reason of the failure of contracting builders to complete construction of an ice plant within the stipulated time, is compelled to purchase ice for their customers at a distant market at a cost in excess of the cost had the plant been completed as agreed, and are compelled to pay the freight in addition, a set-off for such excess and freight, as damages, against an action for balance due on the building contract is for a definite amount and a demurrer as being speculative is overruled.

[Syllabus approved by the court.]

DEMURRER of plaintiff to item one of second cause of defense set forth in answer and cross petition of defendant.

L. J. Dolle, for plaintiff.

W. A. Reiter, for defendant.

BROWN, J. (Orally.)

This action is one for a balance due on the construction of defendant's plant in the village of Miamisburg. To the petition the defendant files an answer and cross petition, admitting the contract, admitting there was a balance claimed of the amount specified but claims under a second defense certain counterclaims and set-offs as enumerated in the second defense, and the question here raised is by demurrer to the first item of this answer and cross petition. The item is not long and I will read it. It reads as follows:

"Second. For a second and further defense and by way of counterclaim or set-off to plaintiff's alleged cause of action, defendant says that plaintiff is indebted to defendant on an account in the sum of \$2,229.09; that the same is due and owing defendant with interest from September 23, 1903. Defendant says said counterclaim and the items thereof are accounted for as follows:" (Item 1 is the one in which the question which we are to consider is concerned):

"I. That under and by virtue of the terms of the said contract between plaintiff and defendant, plaintiff agreed to complete said ice

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plant for defendant not later than fifty-four working days after the roof of the building was completed; that the roof of the building referred to was completed March 17, 1903, and that the time said ice plant should have been completed was May 19, 1903.

"Defendant says said ice plant was not completed by plaintiff until August 21, 1903. Defendant further says that in the early spring of 1903 it entered into a number of contracts to furnish ice to its customers; that by reason of the failure of plaintiff to have said ice plant completed on May 19, 1903, the defendant was compelled to and did purchase ice from various parties between that date and August 21, 1903, in order to fulfill its said contracts and furnish ice to its customers. Defendant says that the amount it was compelled to pay for the ice so purchased by it, including freight charges on the same, from May 19, 1903, to August 21, 1903, exceeded the cost to defendant had it manufactured the same, to the amount of \$1,671.18, and that by reason of the failure of plaintiff to have said ice plant completed on May 19, 1903, defendant has sustained a loss and has been damaged on account of furnishing ice to its customers as aforesaid, in the sum of \$1,671.18. Defendant says it entered into said contracts with its customers, relying on the promise of plaintiff to have said ice plant completed by May 19, 1903."

The demurrer to this item in the cross petition is claimed to be good, by the plaintiff, on the ground that it was speculative damages and damages by way of prospective profits which are so uncertain as not to come within the rule. The question is a very interesting one and there are many decisions upon the subject of the question of the measure of damages and the items which constitute a damage in such a case as this.

There is one case, *Gaar v. Snook*, 1 C. D. 142 (1 R. 259), which is a sawmill case. In this case it says that the defendant bought a sawmill of the plaintiff who warranted the saws were free from seams, etc., and that the mill and saws were to be delivered at a certain time, and in an action to recover the purchase price the defendant claimed damages resulting from a loss occasioned by the failure of the plaintiff in error to furnish suitable saws according to the terms of his warranty, whereby the defendant was prevented from fulfilling a contract made after the delivery of said mill for the sawing of a lot of logs and was deprived of the profits therefrom.

On a demurrer to this, it is held that the claim for damages in the nature of a loss of future profits have such a remote and uncertain character as would not authorize a recovery.

In this case the authorities are reviewed to a considerable extent, and the authorities in this state, and it shows that the law in this state upon this subject is as stated in the syllabus here—that if it is a

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claim for future profits, that is, for profits plaintiffs would have derived from having sawed this lot of logs, it was so remote and contingent and uncertain that it ought not to be given to the jury to be considered, and therefore it is not good.

The case of *Griffin v. Colver*, 16 N. Y. 489 (69 Am. Dec. 718), was "upon a breach of contract to deliver at a certain day a steam engine built and purchased for the purpose of driving a planing mill and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam engine may be recovered as damages.

"The general rule is, that the party injured by a breach of contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates."

In this case Judge Selden, in rendering the decision, reviews the matter quite fully and very learnedly and arrives at the decision as stated in the syllabus from very sound reasoning. He says, page 490:

"The only point made by the appellants is, that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

"To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not."

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The cases are commented upon and he follows out the reasoning as contained finally in the syllabus, and says, page 496:

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., etc., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained— * * * ”: *Held*, as indicated in the syllabus, that, “The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted.” And therefore there was no error.

But in this case Judge Selden does not cite the leading case upon this subject, which is the case of *Hadley v. Baxendale*, 9 Exch. 341. This was decided by the court of exchequer in 1853 and has been a leading case ever since.

This case was an action brought for damages against a common carrier. The facts are, that the plaintiffs in the case below were mill owners and operators. A shaft of their mill was broken and they employed the defendants to convey this shaft to the foundry immediately and the defendants undertook it and agreed to convey it immediately under their direction, but instead of conveying it that day as they were directed to do and as they assumed to do under the contract the defendants waited for eight days. In the meantime the mill was closed down and they sue for damages by reason of that failure to convey the mill shaft for those days which were lost in the operation of the mill, and this case is very fully gone into, in the arguments of counsel and it was decided by Alderson, B., who was one of the judges, and in this case they granted a new trial but in so doing there was a judgment in the court below of the nisi prius court and the judge in rendering the opinion of the court said:

“We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

“It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. * * * ‘There are certain established rules,’ this court says, in *Alder v. Keighley*, 15 Mees. & Wels. 117, ‘according to which the jury ought to find.’ And the court, in that case, adds: ‘and here there is a clear rule—that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken.’

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"Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances as known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract."

This gives the substance of the decision in *Hadley v. Baxendale*, *supra*, and that is the leading case which has been followed ever since.

The case of *Champion Ice Mfg. Co. v. Iron Works Co.* 68 Ohio St. 229 [67 N. E. Rep. 486], which was a suit for damages by reason of a failure of the iron works company to furnish a shaft for their ice plant in accordance with the following telegram (page 230): "Shaft complete with cranks and pins four ninety-eight dollars f. o. b. cars here finish three weeks. Penna. Iron Wks. Co." This was an acceptance of the written request for price and time of delivery of this shaft written by the Cincinnati Company to the defendant company in Philadelphia. There was a failure to furnish the shaft within three weeks and a suit for damages by reason thereof.

Judge Shauck in rendering the decision, on page 233, says:

"The request of the ice company for a proposition for furnishing the shaft gave prominence to its desire for a definite understanding as to the time when it could be furnished. The iron company's proposition to furnish it in three weeks, when accepted, had the force of a stipulation; and no reason appears why there should not be a recovery for its breach. The reasons for the delay which were given upon the trial might well serve to relieve the iron company from culpability, but not from the obligation of its unconditional undertaking to furnish the shaft at the time specified." * * *

"The celebrated case of *Hadley v. Baxendale*, 9 Exch. 341, has

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been generally accepted as defining correctly the principles upon which damages should be assessed for a breach of contract. It has been so accepted in this state. They are such damages as arise naturally from the breach of the contract, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Later decisions show that there has been difficulty in the application of these principles to particular cases, and that case has been many times interpreted and its statements paraphrased, though the correctness of the principles which it defines has been generally, if not universally, accepted. It does not appear that such view has ever been taken of the case as would justify the assessment of damages for the deprivation of the use of property by the computation of interest upon its value," which was done in the common pleas court in this case.

"Nor upon the other hand would it justify the recovery by the ice company in the present case of the large profits which, as its testimony tended to show, were probably lost by reason of the delay. In that respect the case should be regarded as within the rule as familiarly stated, that profits or speculative damages are not recoverable, but which would give the result of a much larger number of cases, and be much less liable to misconstruction, if it were said to be, that the law does not permit the recovery of damages which can be ascertained only by speculative methods. The recovery of lost profits in the present case would involve the local condition of the markets, peculiarities of the ice company's business, its ability to substitute other machinery for the disabled machine, and other elements of injury not arising naturally from the breach of the contract nor presumably within the contemplation of the parties as the result of a breach. By the terms of the correspondence and the circumstances in which it was conducted, the iron company was admonished that the loss of the use of the disabled machine would result from its failure to furnish the shaft at the time agreed upon, and the loss of such use results naturally from the breach. The value of the use of the machine for the time intervening between the day stipulated for its delivery and the day of its actual delivery should, therefore, be ascertained and awarded as damages. Evidence of the capacity of the machine and the extent and character of the ice company's business was properly admitted to aid in assessing damages under the rule stated. In language used so frequently as to be well understood: 'It was to be considered in arriving at the rental value, though not constituting the measure of damages.'"

This shows us that this *Hadley v. Baxendale*, *supra*, as reported in 1853, has been followed in this state very strongly.

Now, applying the rule as laid down by *Hadley v. Baxendale*, and the rule as laid down by the Supreme Court in *Champion Ice Co. v.*

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Iron Works Co. supra, to the question before us, the allegation of damages consists in a breach of the contract in failure to furnish the machine in May, 1903, whereby it lost the use of its plant until the latter part of August, 1903. In contemplation of the parties, a failure to furnish the ice plant in accordance with its contract would certainly be damages arising out of such failure to the defendant, which necessarily would have meant, in order to start its ice plant in May, that it would obtain customers in the spring of 1903. This certainly was in the contemplation of the parties and would naturally flow from that contract.

Now, there was a failure to furnish it for the entire summer of 1903. Therefore there were damages to the defendant by reason of such failure. Now, the question is, What constitutes the damages, the measure of damages, the items to make up these damages in accordance with the rule as laid down by our Supreme Court, following the case of *Hadley v. Barendale*? Prospective profits that it might have made by reason of the operation of its plant in Miamisburg have been eliminated by that case because they are speculative and cannot be determined, but in this case what is the allegation? The allegation is, that, relying upon the contract with the plaintiff the defendant obtained its customers and entered into a contract by reason thereof to furnish ice to its customers during the summer of 1903. What would be the necessary thing for the defendant to do under those circumstances? To say to its customers the ice plant is not finished as we expected it would be, therefore you obtain your own ice? No. It did the natural and proper thing, the right thing under the circumstances; it bought the ice at the nearest market and therefore was compelled to pay a price, a certain price, a fixed price by the market and the freight charges upon the ice to Miamisburg. There was a certain obligation which it had to pay by reason of the failure of the plaintiff to furnish this ice plant in accordance with the contract in May.

Now, where is there any uncertainty as to the amount of damages in this case? It does not allege that there was a loss of profits but it says in this item that the amount of this payment, for these charges which it paid for ice and freight exceeded the amount which the ice would have cost if its plant had been in operation in accordance with the contract by May 1, 1903, and was a definite sum, and that the difference paid by the Miamisburg ice plant by reason of this breach of contract was a definite sum. The cost of the ice and the freight are determined and certain. The cost of the manufacture of the ice by the ice plant when completed is a matter certain and easily determined. There is no such indefinite price, no such speculative damages as are considered in these other cases as for instance the prospective profits which it might derive.

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If it had claimed in its answer, as the plaintiffs did in the saw log case and others, that it lost its customers and lost its profits which it might have had from these customers, then it would not have been within the rule clearly and would have been subject to demurrer. But under all the circumstances, after a very careful consideration of this case and the reading of many authorities, I hold that the allegation in item 1 is within the rule and that statement of damages, if proven, may be recovered, and therefore, the demurrer to this item will be overruled.

TAXATION—STATUTES—CONTRACTS.

[Superior Court of Cincinnati, General Term, May, 1906.]

Ferris, Hosea and Hoffheimer, JJ.

*STATE EX REL. WILSON V. EUGENE L. LEWIS ET AL.

1. CONTRACT EMPLOYING TAX INQUISITOR IS PROSPECTIVE IN OPERATION.

A contract made by certain county officers with a "tax inquisitor," under act 85 O. L. 170 (B. 1343-1 to 1343-4; Lan. 2746 to 2749), "to secure a fuller and better return of property for taxation and prevent omissions of property from the tax duplicate," is prospective in its operation, and applies to services for furnishing information as to taxable property omitted from the tax duplicate subsequent to the date of the contract, as well as to taxes omitted before the date thereof. Hosea, J., dissents.

[For other cases in point, see 7 Cyc. Dig., "Taxation," §§ 536-540.—Ed.]

2. COUNTY AUDITOR NOT REQUIRED TO MAKE EXAMINATION FOR OMITTED TAXABLE PROPERTY.

A county auditor, by virtue of R. S. 2781 (Lan. 4158) *et seq.*, providing for correction of tax returns, and authorizing and empowering him to issue compulsory process when there is a false or erroneous return, is neither compelled nor commanded to issue process for witnesses; nor required to make search for facts or evidence necessary for him to add omitted property to the tax duplicate. Hosea, J., dissents.

[For other cases in point, see 3 Cyc. Dig., "County Auditor," §§ 73-101, 103-114; 7 Cyc. Dig., "Taxation," §§ 431-460, 563-593.—Ed.]

3. TAX COLLECTION STATUTES BROADLY CONSTRUED.

Revised Statutes 1343-1 to 1343-4 (Lan. 2746 to 2749), the object of which is to secure the collection of taxes, are to be broadly construed for the accomplishment of such purpose, following the rule in the construction of remedial statutes. Hosea, J., dissents.

ERROR to special term.

Theodore Horstman, for plaintiff in error.

A. B. Benedict, for defendants in error.

FERRIS, J.

This case, [State ex rel. Gideon C. Wilson v. Eugene L. Lewis et al.,] has appeared in various forms before the general term of this court, and, upon the demurrer filed to the petition, a disposition of the matter was made on April 27, 1904, in the following language:

*Reversed, State v. Lewis, 74 Ohio St. 403.

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"All the questions presented in this case have been adjudicated by us in *State v. Lewis*, 12 Dec. 46; and we are still content with that decision. It follows, therefore, that the demurrer herein filed must be sustained."

The cause was then remanded to special term and permission granted to the plaintiff to amend his petition.

Our attention is drawn by counsel for the plaintiff to the fact that the court expressly passed upon certain allegations in the petition, one of which alleges that the defendant officers authorized and permitted the inquisitor to furnish information as to the taxation of property improperly omitted subsequent to the date of the contract of September 17, 1902; and that a proper interpretation of the contract would deny payment for services in furnishing information as to taxable property omitted from the tax duplicate subsequent to September 17, 1902.

Revised Statutes 1343-1 (Lan. 2746) contains the provision that, certain county officers, "when they have reason to believe that there has not been a full return of property within the county for taxation, shall have power to employ any person to make inquiry and furnish the county auditor the facts as to any omissions of property for taxation," etc.

It is contended that the words, in this section, "has not been," limit contracts made under this provision to the payment of services relating to past omissions. A reading of this section does not reveal an intention to limit or confine the activities of the inquisitor by expressed limitation to omissions already made; in other words, to past events. The language of the act gives to the special tribunal, authority to contract "when they have reason to believe," but nowhere expressly states the time when such action is to be taken, nor to what situation or condition such act shall apply; but the act is explicit in saying that when justified in the belief that there has not been a full return of property within the county for taxation, that they may "employ any person to make inquiry and furnish the county auditor facts as to any omissions of property for taxation and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate." This language is clear in defining the nature of the contract of employment, and words of broader meaning could scarcely be employed to indicate the extent of the examination thus to be made, the object of which plainly is to secure the collection of public taxes, and must be as broadly construed for the accomplishment of the purpose as follows the rule in the construction of remedial statutes. And when the design and purpose of the act is borne in mind and the conditions to be covered by the statute, and the relief to be afforded by proper application of the rule, it would seem that no narrow con-

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struction should be given to the act, the effect of which might be the defeat of the very object had in the passage of the act.

We pass over the suggestion of collusion between the officers, as furnishing no proper basis for the narrow construction requested.

A proper translation of Rev. Stat. 1343-2 (Lan. 2747) would seem to answer in a conclusive way, the argument made against the limitation of the contract to past transactions only. In view of the provisions of the last section quoted, the legislative mind would scarcely have used the expression, "any omissions," as barring therefrom, future omissions designedly brought about by the collusion of the auditor and the inquisitor.

We think there is no question therefore that the term "any omissions" was intended to include all omissions, past, present and future, as was plainly the intention of the original act (85 O. L. 170) entitled, "An act to secure a fuller and better return of property for taxation, and prevent omissions of property from the tax duplicate."

This view is further sustained by the history of the legislation on this subject, and the evolution that began with the act of April 14, 1880 (77 O. L. 205), law of April 23, 1885 (82 O. L. 152) and the act of April 10, 1888 (85 O. L. 170), wherein the language first employed limited the employment to "any omissions occurring previous to the passage of this act," while the last expression of the legislature now under consideration, extends the employment to "any omissions," etc. The reason at the foundation of the construction here given, is fully set forth in *State v. Crites*, 48 Ohio St. 142 [26 N. E. Rep. 1052].

Our attention has been drawn to the following language:

"That said contract is invalid because under the laws of Ohio, it is made the duty of the county auditor of Hamilton county to ascertain the facts and evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax lists and duplicates of Hamilton county, and to place such omitted property upon the tax lists and duplicates; that the payment to said Henry W. Morgenthauer of any money under said contract for the discharge of such duty would be a misapplication of the public money of Hamilton county, Ohio."

This necessitates an examination of the statutory duties of the auditor in relation to omitted taxable property, as such duties are set forth in Rev. Stat. 2781, 2781a, 2782 (Lan. 4158, 4159, 4160), as well as Rev. Stat. 6044 (Lan. 9584) relating to such property as is set forth in an inventory required by administrators and executors.

An examination of Rev. Stat. 2872 (Lan. 4332) does not, in our judgment, justify the conclusion that it is made the duty of the auditor to make a search for facts and evidence necessary to enable him to add omitted property to the duplicate. And even though that contention or construction be wrong, we are unable to see the force of the objection

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made under the charge. Revised Statutes 2782 (Lan. 4160) provides, as a duty of the county auditor, when he has reason to believe, or is informed, that one has given a false return to the assessor, or has omitted taxable items, or has made an erroneous return of his property, that the auditor shall correct the return, and in so doing, he is authorized and empowered to issue compulsory process, but there is nothing in this language compelling the auditor to institute such examination. He is obligated to act only when he has reason to believe or is informed that there is a false return, and when informed or having reason to believe, is authorized and empowered, but not commanded, to issue process for witnesses.

Under the contract, it is the inquisitor's duty to secure evidence, to appear before the auditor and present such facts to him, for the purpose of carrying into effect the plain objects of such contract, a reading of which leaves no doubt that it becomes the duty of the inquisitor to make search for, to obtain and investigate the necessary facts and evidence, and present the same to the auditor, who, at such time, would have reason to believe and would be informed as to his duties in the premises. *Richmond v. Dickinson*, 58 N. E. Rep. 260 (Ind.), furnishes what we believe to be sound reason as applied to this condition.

We do not believe, therefore, that, under these sections properly construed, the auditor is required to make search as part of the duty of his office. And, therefore, we are of opinion that the contract does not cover duties required of the auditor in this behalf; and that, therefore, there was a necessity for the employment complained of.

In this view of the case, it does not seem necessary to pass upon the other objections made to this fourth issue.

Demurrer to the amended petition is therefore, sustained.

Hoffheimer, J., concurs.

HOSEA, J., dissenting.

The question here is, whether the contract made by the county officers with Morgenthaller as "tax inquisitor," under Rev. Stat. 1343-1 to 1343-4 (Lan. 2746 to 2749) on September 17, 1902, is valid as a contract relating to tax omissions occurring in returns subsequent to its date; in other words, whether said law authorizes contracts having a prospective operation.

Various other questions arising upon this or a similar contract with Morgenthaller were disposed of by this court in *State v. Lewis*, 12 Dec. 46, but upon a suggestion *arguendo* the court declined to pass upon the question because not raised by the pleadings.

From the majority opinion in the present case, holding that such contracts may have a prospective operation, I am constrained, notwithstanding my high respect for the views of my associates on the bench,

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to dissent, first, because the language of the statute seems to me to preclude such view; and, second, because, if the language were susceptible of the construction indicated, the general policy of the law is against it.

The language of Rev. Stat. 1343-1 (Lan. 2746) is as follows:

"[Authorizing employment of tax inquisitors; their compensation.] The county commissioners, county auditor and county treasurer, or a majority of said officers in any county, *when they have reason to believe that there has not been a full return of property within the county for taxation*, shall have power to employ any person to make inquiry and furnish the county auditor the facts as to any omissions of property for taxation and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate," etc.

1. As the power to make such contract is wholly derived from the statute, the conditions and limitations of the power specified in the statute must be given effect. The subject-matter with reference to which the power is given in this instance is defined in the opening sentence of the act stating a contingency which is the condition precedent to the exercise of the power, namely:

"When they have reason to believe that there has not been a full return of property within the county for taxation, they shall have power to employ any person to make inquiry," etc.

This language has obvious reference to an existing condition growing out of a past fact, namely: a condition arising upon one of the annual returns required by law, previously made.

The common canons of construction require us to refer all relative words and expressions, that follow later in the sentence, back to this dominant subject-matter, namely to the certain specific return, made under the law, which the designated officers have reason to believe is not full and complete. So that the subsequent words, "any omissions" and "any property improperly omitted," refer to omissions existing in the return already made; and there seems to me no warrant in the language of the act for any other interpretation.

2. In tracing the history of the statute, I find nothing to suggest any intention of the legislature to extend the power of contracting to possible future omissions. The original statute of 1880 (77 O. L. 205) confined its operation to omissions occurring prior to the passage of the act. In the special act of 1885, relating to Hamilton county (82 O. L. 152), the language is, "any property improperly omitted," which is a common mode of expressing an existing condition, and does not refer to a future possibility. In the present act, passed in 1888 (85 O. L. 170), the limitation is still more specific by stating a condition precedent, namely, "when they have reason to believe that there has not

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been a full return," etc., which necessarily relates to a past event constituting an existing condition with sole reference to which the power is granted.

3. Neither do I find in the opinions of the courts upon analogous statutes any support for the enlargement of the present statute by construction.

A question very similar to the present one arose before me in the case of *State v. Gibson*, under the statute authorizing employment of a private individual to assist the treasurer in the collection of delinquent and forfeited taxes. This court held that the contract must be confined strictly to past forfeitures, which was affirmed by the higher courts. *State v. Gibson*, court index, July 23, 1903; affirmed in general term, *State v. Gibson*, 14 Dec. 513; affirmed by Supreme Court, *State v. Gibson*, 70 Ohio St. 424 [72 N. E. Rep. 1165].

A clearly analogous case is that of *Hamilton Co. (Comrs.) v. Arnold*, 65 Ohio St. 479 [63 N. E. Rep. 81], based upon the statute authorizing employment of assistants in the collection of delinquent chattel taxes. The Supreme Court lay stress upon observance of statutory conditions, and incidentally lay down a principle having a pertinent application to the present case. In the opinion it is said, page 484:

"Statutes enacted for the protection of the public revenues, are usually not merely directory, but mandatory. * * * Each delinquent list must be read and an employment made to collect the same, but there can be no employment of collectors to collect future lists. The employment of such collectors cannot be turned into an office to be held to the end of the treasurer's term, or for any definite period. His employment is to collect the delinquent list which has been read, or some part thereof, and when that is done his employment ends."

While the opinion is, perhaps, confined to a discussion of the particular law, yet it is impossible to read its clear and forcible language without feeling that beyond its particular application, the court is stating in effect a rule of public policy inconsistent with any enlargement of such powers by construction to include future contingencies, and the clear intimation is, that such construction would create an office auxiliary to that of the elective office, for the performance of duties with which the office is charged by general laws.

4. The foregoing considerations suggest a broader view, involving questions of a general public policy.

There can be no question as to the general purpose of our system under which all duties of a public character are assigned to only elected public officers. In the matter of taxation, the citizen is required, under suitable penalties, to return his property for taxation, to assessors who have power to correct returns and supply omissions, as to which the

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auditor has full power of investigation. The auditor is also given a special compensation to bring omitted property upon the duplicate.

I do not concede that the duties of the auditor are perfunctory or merely clerical. In *Probasco v. Raine*, 50 Ohio St. 378 [34 N. E. Rep. 536], the Supreme Court has spoken upon this subject as follows, page 391:

"To have equality in taxation, all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services, either by fees or salary. The legislature has full power under the constitution to say what officer shall perform such duties, and in what manner he shall be paid.

"It has enacted that such duties shall be performed by the auditor, and that he shall be paid as provided in section 1071 [Lan. 2411]," etc.

Contracts of the nature here in question find their justification in the increased complexity and amount of modern business interests and investments and the facilities thereby afforded for escaping taxation; and, so far as they are confined to residual matters which the ordinary public officers have failed to reach and accomplish, after diligent efforts made in good faith to discharge their official duties in the premises, the employment of private assistance is proper and reasonable. Such seems to have been the view of courts in passing upon analogous contracts; but they have confined them strictly to such residual matters. To go further and enlarge the power to include future contingencies, opens up a door to obvious evils that a correct public policy must avoid. It is a step backward in the direction of farming out the collection of the public revenues to private interests, that history warns us against; and I find no authority in this case for supposing that it was the intention of the legislature to take this step.

For the reasons given, I think the demurrers should be overruled.

Nicola Bros. v. Hambrick.

INJUNCTION—JUDGMENTS.

[Superior Court of Cincinnati, Special Term, 1906.]

NICOLA BROS. v. HAMBRICK ET AL.

INJUNCTION WILL NOT LIE TO PREVENT SUIT ON VOID JUDGMENT.

Injunction cannot be had to prevent suit upon a foreign judgment, void on account of want of jurisdiction of the court rendering it.

[For other cases in point, see 5 Cyc. Dig., "Injunction," §§ 172, 173; "Judgments and Decrees," §§ 1247-1250.—Ed.]

[Syllabus approved by the court.]

DEMURRER to petition.

C. W. Baker, for plaintiffs.

T. L. Michie, for defendants.

HOSEA, J.

The petition alleges in substance that defendants obtained a judgment against plaintiffs in West Virginia by virtue of service upon a party as their agent who was not in fact their agent; and that the court rendering said judgment was without jurisdiction and the judgment, consequently, void; and prays an injunction against defendants to prevent suit upon said judgment.

The primary basis for the exercise of the extraordinary powers of the court in injunction proceedings is the inadequacy of legal remedies. No such condition appears here. When the judgment is set up by a suit, it is manifest that the facts here alleged will be available as a defense at law, and no facts are pleaded indicating any reason for anticipating by the present suit, the defensive action of plaintiffs to any suit that may be brought against them on the judgment. Moreover, a charge of fraud in obtaining a judgment admittedly regular on its face, will be disregarded where no facts are pleaded as a basis for the charge, and where the other several allegations are apparently so guarded as to be colorless.

The order sustaining the demurrer was rightly made and will stand.

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COMPENSATION—COUNTIES—PROSECUTING ATTORNEYS.

[Hamilton Common Pleas, 1907.]

STATE EX REL. RULISON, PROS. ATTY., ET AL. V. RUDOLPH K. HYNICKA.

SAME V. JOHN H. GIBSON.

SAME V. TILDEN R. FRENCH.

1. REASONABLE ALLOWANCE TO PROSECUTOR FOR RECOVERY OF MONEY DUE COUNTY.

A county prosecuting attorney is required by Rev. Stat. 1277 (Lan. 2655) to recover, by suit, any money due to the county, and Rev. Stat. 1278a (Lan. 2657) provides that the court shall allow that official, for such services reasonable compensation and expenses. When a prosecuting attorney, in pursuance of the duty imposed upon him by Rev. Stat. 1277 (Lan. 2655), collects from the county treasurer and two ex-treasurers the sum of \$214,998.76,—his work consisting in making demands from time to time upon these defendants as the amounts for which they were liable were disclosed by investigation and grew in size, consulting frequently with opposing counsel, determining various points of law, bringing three suits and getting three judgments, collecting the money and putting it out at interest until the legal formalities necessary to paying it into the county treasury could be complied with, and finally paying the entire principal and interest into the county treasury—an allowance to him of \$7,500 with all expenses incurred is a reasonable compensation.

[For other cases in point, see 7 Cyc. Dig., "Prosecuting Attorney," §§ 70-76.—Ed.]

2. LEGAL COUNSEL EMPLOYED BY COMMISSIONERS MAY BRING ACTION TO RECOVER MONEY DUE COUNTY.

Previous to 1904, the prosecuting attorney alone was authorized to bring suits to recover money due to the county. This he did by virtue of Rev. Stat. 1277 (Lan. 2655). In 1904 Rev. Stat. 845 (Lan. 2104) was passed, providing that whenever a board of county commissioners of any county deemed it advisable, it might employ legal counsel for the county; and when so employed, such legal counsel should, among other duties, "perform such duties and services as are now required to be performed by prosecuting attorneys under sections * * * 1277 and 1278a [Lan. 2655 and 2657] * * * of the Revised Statutes, and as may, at any time, be required by said board of county commissioners." The passing of Rev. Stat. 845 (Lan. 2104) does not repeal Rev. Stat. 1277 (Lan. 2655), so that the duties enumerated in Rev. Stat. 1277 (Lan. 2655), including that of bringing an action to recover money due to the county, belong now to both the prosecuting attorney of the county and to legal counsel employed by the county commissioners.

[For other cases in point, see 3 Cyc. Dig., "Counties," §§ 769-802.—Ed.]
[Syllabus by the court.]

W. W. Prather, T. H. Darby and Froome Morris, for plaintiff:

On allowance for attorney fees. *State v. Jennings*, 57 Ohio St. 415 [49 N. E. Rep. 404; 63 Am. St. Rep. 723]; *State v. Halliday*, 61 Ohio St. 352 [56 N. E. Rep. 118; 49 L. R. A. 427]; *Barker v. State*, 69 Ohio St. 68 [68 N. E. Rep. 575]; *State v. Yates*, 66 Ohio St. 546 [64 N. E. Rep. 570]; *State v. Killets*, 46 Bull. 258; *Railway v. Hedges*, 63 Ohio St. 339 [58 N. E. Rep. 804]; *Insurance Co. v. Myers*, 59 Ohio St. 332 [52 N. E. Rep. 831]; *Chapman Mfg. Co. v. Taylor*, 61 Ohio St. 394 [55 N. E. Rep. 1003].

State v. Hynicka.

M. R. Waite and Murray Seasongood, attorneys appointed by the court.

LITTLEFORD, J.

These actions were brought by the state of Ohio on the relation of Hiram M. Rulison, prosecuting attorney for Hamilton county, Ohio, and Louis A. Ireton, legal counsel for Hamilton county, Ohio, to collect money due to the county from the defendants, which money was received by the defendants while serving as treasurers of this county from banks in which county funds had been deposited, the money being paid by the banks in return for the use of such deposits.

Later on, upon the theory that the legal counsel of Hamilton county had no lawful authority to perform the duties required of the prosecuting attorney under Rev. Stat. 1277 and 1278a (Lan. 2655 and 2657), Louis A. Ireton was, with his own consent, ousted from the performance of such duties by a suit in quo warranto. Mr. Louis A. Ireton is, therefore, no longer in this case.

Judgments have been entered in all of these suits in the sum of \$214,-998.76, which was collected and paid into the county treasury by Mr. Rulison. Later, Mr. Rulison moved the court to fix and allow to him a reasonable compensation for his services in collecting this money.

Thereupon C. B. Wilby, Esq., a member of this bar, appeared before one of the judges of the common pleas court and moved that counsel should be appointed by the court to investigate the merits of the claim made by Mr. Rulison. The court granted the motion of Mr. Wilby and appointed Morrison R. Waite, Esq., and Murray Seasongood, Esq., members of this bar, "to look into the merits of the claim made by said Hiram M. Rulison, to the end that if the said claim is justified beyond question its payment may not be unreasonably delayed, and if the said claim is open to doubt, that its merits be investigated without delay, and, it being unlawful or of uncertain legality, that it shall be opposed."

In the course of time these gentlemen filed their report with the court. The report is lengthy, and is evidently painstaking and fair. It sums up all the work done by Mr. Rulison in investigating the claims upon which he afterwards brought these actions, and the steps taken by him to recover the money; finds that "The services performed by Mr. Rulison were in part services which he was required to perform as prosecuting attorney in relation to the criminal liability of the defendants, and for such services he was compensated by the salary provided for him by law;" and concludes by saying:

"We believe that his compensation should be fixed, if the court determines that he is entitled to compensation, not by a percentage upon the amount recovered, but by an allowance for time somewhat com-

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mensurate with the value of his time as valued by the legislature in fixing his salary."

It will be impossible to quote the report in full, but the part that is quoted will give a fair idea of its findings and conclusion.

The question of compensation of Mr. Rulison now comes before this court on his motion for a reasonable allowance, and his claims are contested by Messrs. Waite and Seasongood, except upon points where both sides are agreed. These gentlemen will, for convenience, be referred to hereafter as the committee.

For the time and labor given by Messrs. Seasongood and Waite to the investigation of the facts in this case, the preparation of their report, their arguments in court, and their briefs afterward handed in, they are entitled to the thanks of the public, the bar and the courts, in having performed a public duty ably and unselfishly; and this court now desires to express its thanks to them.

* * * * *

The facts in this case are set forth in a statement agreed upon by the attorneys, and any reference to the facts in this opinion is based upon that agreed statement. No better or briefer summary of the facts could possibly be made, and it is therefore given in full. A vast array of figures is also submitted, but they are too voluminous to be given here.

"AGREED STATEMENT OF FACTS UPON MOTION OF HIRAM M. RULISON, PROSECUTING ATTORNEY, FOR ALLOWANCE TO HIM OF REASONABLE COMPENSATION FOR SERVICES RENDERED IN THE ABOVE CAUSES.

"It is agreed that the following statement of facts shall apply to all of the above cases, and be used therein, except where the facts in the individual cases differ, in which instances the specific differences will be herein set forth.

"It is further agreed that these motions be submitted to the court upon this statement of facts; the exhibits attached hereto, the affidavits on file, if found by the court to be legally relevant and material, arguments of counsel, and such further testimony as to the value of the services rendered by Mr. Rulison as the parties may offer before argument.

"1. On February 23, 1906, the so-called Drake committee elicited and made public the fact that the above-named defendants during their incumbency of the county treasurer's office, had received checks in payment of taxes, which were deposited for collection in the various banks of the city, and that said deposits had by them been left with said banks, and that the banks had paid to said defendants interest upon such deposits which they retained as and for their own.

"2. Prior to January 11, 1906, the representatives of the bureau of uniform accounting of this state made an examination of the office of

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the county treasurer of this county, which discovered that there was on that date in said office an apparent shortage of \$1,258,679.51.

"This apparent shortage was covered by certificates of deposit of such funds in the various banks of the city of Cincinnati. This discovery was not then reported or made public, or disclosed to Mr. Rulison.

"3. Early in March Mr Rulison learned that such examination had been made, and that the report thereof had not yet been made. He called Mr. Bliss, one of said examiners, into his office, and insisted that said report be filed at once, and communicated with the attorney-general and the auditor of state, requesting that the said report be at once filed, and a copy of it transmitted to him, which was immediately done, to wit: March 10, 1906, and said copy is hereto attached, marked 'Exhibit A.'

"4. Mr. Rulison attended the sessions of the Drake committee from the beginning, for the purpose of acquiring information for the use by him in any matter, civil or criminal, which might properly be instituted.

"5. Thereafter Mr. Rulison caused the grand jury to reconvene, and on March 21, 1906, proceeded to submit to it evidence relating to such use of the public funds, and procured the attendance before said grand jury of representatives of all of the banks of the city, and obtained from all the banks which had had deposits, statements of the amounts and dates when they had had such funds on deposit, and also obtained from some of the banks a statement of the amount of interest which had been paid by them to the respective treasurers. These statements are verified by affidavits of the representatives of the banks, who testified before the grand jury: which said affidavits are on file in the prosecuting attorney's office and will be submitted to the court.

"6. On March 14 a taxpayer of Hamilton county requested Mr. Rulison to bring suit under Rev. Stat. 1277 (Lan. 2655), for the recovery of the interest received by the treasurers and any profits made by the banks from the money in their hands in excess of the amount paid by the treasurers, which request was made under and pursuant to the provisions of Rev. Stat. 1277 and 1278 (Lan. 2655 and 2656). This demand Mr. Rulison was entitled to construe, and did construe, as an intimation that if he as prosecuting attorney did not act in the premises, such action would be brought by the taxpayer, under Rev. Stat. 1278 (Lan. 2656). Said letter containing this request is hereto attached and made a part hereof, marked 'Exhibit B.'

"7. After the disclosure of the payment of interest to the defendants, the defendant, Mr. Hynicka, on March 1, 1906, deposited in bank the sum of \$25,000 to be used to pay the amount of any civil liability from him to the county by reason of the premises, if such

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liability might thereafter be established in an appropriate action. Later, to wit: on March 20, 1906, Mr. Rulison demanded the payment to him of the amount so deposited by Mr. Hynicka, which was paid to Mr. Rulison to meet his (Hynicka's) liability to the county, when the amount should be established, and demands were made and other sums deposited with Mr. Rulison by the other defendants above named, Mr. French and Mr. Gibson, and an additional amount by Mr. Hynicka; the dates and amounts of such payments are as follows:

"March 1, Mr. Hynicka deposited (subject to litigation) \$25,000
in Second National Bank.

March 20, Mr. Hynicka paid to H. M. Rulison.....	\$ 25,000 00
March 21, Mr. French paid to H. M. Rulison.....	35,000 00
March 23, Mr. Hynicka paid to H. M. Rulison.....	25,000 00
March 24, Mr. Gibson paid to H. M. Rulison.....	70,673 65
March 29, Mr. Hynicka paid to H. M. Rulison.....	8,370 79
March 30, Mr. French paid to H. M. Rulison.....	30,000 00
March 31, Mr. Gibson paid to H. M. Rulison	26,390 66

\$220,435 10

"These deposits were made after Mr. Rulison had notified these gentlemen that he proposed to bring suits to recover from them, and that he intended a vigorous prosecution.

"Many consultations were had with counsel for the various defendants by Mr. Rulison.

"8. The disclosures before the so-called Drake committee showed that the three defendants above named had received as interest at least the sum of \$67,370.81; statements of which were furnished to Mr. Rulison, and are hereto attached marked 'Exhibit C.'

"9. The investigation before the grand jury continued from day to day, and Mr. Rulison, with the help of all of the assistants in his office, by means of arduous work night and day, including Sundays, obtained evidence which showed the receipt by said defendants of \$127,-137.81.

"10. Thereupon on March 25, 1906, Mr. Rulison, believing that there was still more due the county, and that an expert and systematic examination would verify that belief, employed an expert accountant, Mr. J. H. Watters, who with his assistants, under Mr. Rulison's direction, until April 3, 1906, made calculations and examinations of the books of the banks and statements submitted with a view to ascertaining the total amount paid by said banks to the said defendants. In his investigations and calculations Mr. Watters worked night and day, and was advised, instructed and directed by Mr. Rulison as to the investigations and calculations, with a view to ascertaining any possible amount

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which might be properly charged against these defendants. A copy of the tabulations made by Mr. Watters and his assistants will be submitted to the court.

"11. Mr. Watters' calculations on March 30, 1906, disclosed that the total sum received by the three defendants above named as herein stated, was \$211,076.29.

"12. The grand jury in the meantime had investigated the matters and things hereinbefore set forth, and its report was not yet made, when on March 30 the above-entitled actions to recover the sum aggregating \$211,076.29 were commenced. Demurrers to the petition were filed, at once, and by agreement immediately overruled, and the defendants not desiring to plead further, testimony was heard and judgments given against the three defendants aggregating the amount claimed in the petitions. It was stipulated by Mr. Rulison, and agreed to by counsel for defendants, that no exceptions were to be taken by counsel for defendants to the overruling of the demurrer or to any of the proceedings, and that no motion for a new trial would be filed by any of the defendants, so that the whole matter might not be opened for review or modification.

"13. Prior to the institution of said suits, enough money had been deposited by two of the defendants, to wit: Messrs. Hynicka and French, with Mr. Rulison (after his demand and upon his reports from time to time to them, as the investigation proceeded) to more than pay the judgments as entered against them.

"The defendant Gibson had similarly paid sums from time to time, but when the judgments were entered there was still about \$30,000 due from him.

"Mr. Rulison insisted on the immediate payment of this balance, which was paid on the morning of March 31, 1906, before the grand jury reported, thus placing in his hands enough money to fully pay the individual judgments.

"All of this money Mr. Rulison deposited in banks to his own credit as prosecuting attorney from time to time, as rapidly as collections were made by him, while the investigation was proceeding.

"The money so deposited earned \$138.59 interest for the county.

"The total sum of \$214,998.78, including said interest, and \$3,783.88 referred to in Sec. 15 hereof, was paid to Rudolph K. Hynicka, treasurer of Hamilton county, by H. M. Rulison, in cash, April 3, 1906.

"Mr. Rulison's receipt for said money is hereto attached and marked 'Exhibit D'.

"14. On March 31, 1906, the grand jury filed its report (but returned no indictments against said treasurers, growing out of said investigation), setting forth that the receipt of interest by the treasurers

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was in accordance with a long-established practice, and that restitution had been made, and in their judgment no indictments should be returned against these three treasurers.

"15. After the rendition of the judgments, it was discovered by Mr. Watters, who was still acting under Mr. Rulison's direction, that \$3,783.88 additional was properly chargeable against Mr. French, which amount was retained by Mr. Rulison, and paid to the county treasurer as aforesaid, out of the amount previously paid by Mr. French to cover his liability to the county.

"16. During the progress of the investigation many difficulties were encountered, the chief among which was the inability of two of the banks to state either the amounts of interest actually paid by them, the rate of interest, or the actual sums upon which said interest was computed. The deposits in these banks were very numerous, and covered a period of about ten years. It, therefore, became necessary, if the county was to recover from the three above-named treasurers the interest paid to them by these two banks, to compute the interest anew, but what rate of interest should be charged as a fair average for the entire period, and upon what sums it should be chargeable, became serious questions which could only be solved by fixing upon arbitrary standards. Desiring to conserve the best interests of all parties, and particularly that of the county, Mr. Rulison called to his office three of the county's most prominent and reputable citizens, to whom he submitted all the facts relating to the situation. After consultation, this committee decided that, while at various times the banks had paid $1\frac{1}{2}$ to $2\frac{1}{2}$ per cent upon funds which had remained on deposit for stated periods only, the treasurers were nevertheless fairly chargeable with interest at the rate of 2 per cent upon all deposits for the entire period embraced in the inquiry.

"17. On February 26, 1906, three days after the Drake committee began its public sessions, Mr. Rulison publicly announced his intention of filing suits against Messrs. French, Gibson and Hynicka to recover from them such sums as they were alleged to have collected as interest, and to that end requested Mr. Roettinger, chief counsel for the committee, to furnish him with a copy, or to permit him to take a copy of each schedule, showing dates and amounts of deposits and withdrawals, together with the amounts paid as interest to the above-named treasurers.

On or about March 10, in order to avoid possible legal objection as to whether the right party was plaintiff, and to get the benefit of Mr. Ireton and his assistants' aid, Mr. Rulison invited Mr. Ireton and his assistants to confer with him and join as plaintiffs in the petition it was proposed to file against the treasurers. Mr. Rulison and his assistants and Mr. Ireton and his assistants accordingly began to con-

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sult on or about the above mentioned date upon the proposition of law involved and the forms of petition to be employed.

"18. Acting upon the theory that legal counsel of Hamilton county had no legal authority to perform the duties required of the prosecuting attorney under Rev. Stat. 1277 and 1278a (Lan. 2655 and 2657), and that he, as relator, might be adjudged to be entitled to perform said duties, Mr. Rulison, on April 19, 1906, filed a suit in quo warranto on his own relation as prosecuting attorney, against such legal counsel and his assistants, praying that they might be ousted from the performance of such duties under said section. By consent of said legal counsel, a judgment of ouster was granted as prayed for, and Mr. Rulison was adjudged entitled to act under these sections.

"19. When Mr. Hynicka deposited the \$25,000 in Second National Bank, to be subject to litigation, Mr. Rulison prepared briefs and held consultations with his assistants and Mr. Ireton and assistants who also prepared a brief, as to the proper and most effective action to be brought against the various treasurers.

"Mr. Rulison then made demand upon Messrs. Hynicka, French and Gibson for the return of the money in question:

"Mr. Ireton had nothing to do with the investigations or demands or with the negotiations concerning the amount of money to be recovered by the state.

"Mr. Ireton consulted with the attorneys for the various defendants as to the form of the petitions, and then drew them after consultation with Mr. Rulison and his assistants.

"Mr. Ireton has at all times and does now disclaim any right to compensation for services in these cases.

"20. It is admitted as a fact, to be considered by the court if found to be legally relevant and material, that immediately after the satisfaction of the judgments, Mr. Rulison made a statement which was published, that he did not expect to make any claim for compensation under Rev. Stat. 1278a (Lan. 2657), for services rendered in said causes.

"21. Mr. Rulison received as compensation from the public treasury for all services rendered by him as prosecuting attorney during the year 1905 the sum of about \$6,300.

"(Signed) WM. W. PRATHER,

"FROOME MORRIS,

"THOS. H. DARBY,

"Counsel for H. M. Rulison.

"MURRAY SEASONGOOD,

"MORRISON R. WAITE,

"Attorneys appointed by the court."

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* * * * *

Evidence was introduced as to the value of the services rendered by Mr. Rulison. In his behalf Mr. Rulison offered affidavits from fifteen prominent members of the Hamilton county bar. Some of these gentlemen fixed the compensation as low as 5 per cent of the entire amount collected, and some fixed it as much as 10 per cent of the amount collected; that is, ranging from \$10,750 to \$21,400.

The evidence introduced by the committee consisted of the testimony of four prominent members of the bar, who fixed the compensation as low in one instance as \$1,000, and as high in another instance as \$3,000.

But these affidavits in Mr Rulison's behalf include work done by him in searching for evidence to present to the grand jury for their consideration so that they might determine whether or not the treasurer, the ex-treasurers and others, ought to be indicted for embezzlement. It is the opinion of the court that for such work Mr. Rulison ought not to be paid.

The answer to a hypothetical question should be disregarded if any of the statements embraced in the question should not have been included. These affidavits, therefore, will be excluded from consideration as evidence in the case.

* * * * *

It is provided by Rev. Stat. 1278a (Lan. 2657) that,

"For all services rendered by the prosecuting attorney under the provisions of section 1277 [Lan. 2655] in which the state is successful, the court shall allow the prosecuting attorney reasonable compensation for his services and proper expenses incurred."

The services referred to are defined in Rev. Stat. 1277 (Lan. 2655). This section is too long to be given in full. It provides that the prosecuting attorneys of the several counties of the state, on being satisfied that the funds of the county in the hands of the county treasurer or belonging to the county are about to be, or have been, misapplied or withheld from the county treasury, etc., may apply, by civil action in the name of the state, to recover back all such public moneys, etc.

Whether or not the work done by Mr. Rulison, or any part of it, comes within the terms of this section, will be taken up later; but it must first be seen if Rev. Stat. 845 (Lan. 2104) passed in 1904, has done away with the rights of a prosecuting attorney to be paid as provided for in Rev. Stat. 1278a (Lan. 2657). The paragraph of Rev. Stat. 845 (Lan. 2104) referred to is as follows:

"(Legal counsel.) Whenever the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein

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enumerated. Such counsel shall be the legal adviser of the board of county commissioners and the board of control, where there is such board, and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or, to which any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys under sections 799, 1277, 1278a and 3977 [Lan. 1763, 2655, 2657 and 6456], of the Revised Statutes, and as may at any time be required by said board of county commissioners."

Counsel for Mr. Rulison have ably argued that Rev. Stat. 845 (Lan. 2104) is unconstitutional because it creates a public office to be filled otherwise than by election, and is, therefore, contrary to Art. 10, Secs. 1 and 2 of the constitution of Ohio. These sections provide that county officers shall be elected, whereas under Rev. Stat. 845 (Lan. 2104) the legal counsel of the county is to be employed. There is much force in this contention; but this court is reluctant, being but a court of inferior jurisdiction, to declare any act of the general assembly unconstitutional. Without going into the merits of the argument, therefore, Rev. Stat. 845 (Lan. 2104) will be held to be constitutional.

Taking Rev. Stat. 845 (Lan. 2104) to be constitutional, did the passing of said section by the legislature take away, by implication, from the prosecuting attorney the duties devolved upon him by Rev. Stat. 1277 (2655)? The court is of the opinion that it does not.

Repeals by implication are not favored. This has been laid down several times by the Supreme Court of Ohio.

"Repeals by implication are not favored, especially under our present constitution; and it is a well-settled rule of construction, applicable to all remedial laws, that where a new remedy or mode of proceeding is authorized, without an express repeal of the former one relating to the same matter, it is to be regarded as merely cumulative, creating a concurrent remedy, and not as abrogating the former mode of procedure." *Raudebaugh v. Shelley*, 6 Ohio St. 307, 316; *Gallup v. Lorain Co. (Comrs.)* 20 Ohio St. 324; *State v. Newton*, 26 Ohio St. 200, 204; *State v. Railway*, 36 Ohio St. 434.

Of course if Rev. Stat. 845 (Lan. 2104) and Rev. Stat. 1277 (Lan. 2655) are both in force, then there are two persons in this county authorized to bring actions to recover money withheld from the county treasury; and that such is the case is the opinion of the court.

Against this view the committee advances the following argument:

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In Rev. Stat. 799, 1274 and 3977 (Lan. 1763, 2652 and 6456), the legal duties to be performed by the prosecuting attorney in counties where there is no county solicitor are taken out of his hands by express words in these statutes, wherever there is a county solicitor in the same county; that in these three sections it is evidently the intent of the legislature that the county prosecutor and county solicitor are not both to have the same duties to look after; and that, therefore, when Rev. Stat. 845 (Lan. 2104) was passed, it must have been the intent of the legislature that as soon as legal counsel was employed by the county commissioners in this county, the duties enumerated in Rev. Stat. 1277 (Lan. 2655) must be attended to by such legal counsel alone, and not by both him and the county prosecutor. This argument cuts both ways. It would be just as reasonable to hold that because the legislature had in Rev. Stat. 799, 1274 and 3977 (Lan. 1763, 2652 and 6456) provided that two functionaries are not to attend to the same duties, the omission to so provide in Rev. Stat. 845 (Lan. 2104) was intentional; and that, when the county legal counsel was given the power to collect money due to the county, it was intended that both he and the county prosecuting attorney should be clothed with the same power.

If the legal counsel employed by the county commissioners alone has power to bring the actions mentioned in Rev. Stat. 1277 (Lan. 2655) as is contended by the committee, then serious complications arise. The legal counsel is required by Rev. Stat. 845 (Lan. 2104), among other duties, to defend all the county boards and county officers; while under Rev. Stat. 1277 (Lan. 2655) the same boards and officers are to be proceeded against for acting in violation of duty affecting the public moneys of the county. How can the legal counsel bring such proceedings under Rev. Stat. 1277 (Lan. 2655), when under Rev. Stat. 845 (Lan. 2104) he is bound to "defend all suits and actions" against these boards and officers?

The conclusion of the court is, that Mr. Rulison had the right to bring these actions to recover this money due to the county.

* * * * *

The opinion was expressed from the bench during the hearing on this motion, and has been repeated above, that Mr. Rulison is not entitled under the law to be paid for work which it was his duty to do as prosecuting attorney of this county, in searching for, and presenting to, the grand jury evidence upon which to base indictments of these defendants and others for embezzlement.

Mr. Rulison in fact does not claim compensation for any such services, but he maintains that a large amount of hard work was done by him in recovering this great sum of money for the county which was over and above the work of finding evidence to present to the consideration of the grand jury. For any such work done by him he is

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entitled to be paid under the provisions of Rev. Stat. 1278a (Lan. 2657) quoted above.

The work done by Mr. Rulison, in pursuing these defendants and recovering this money, was prompt, vigorous, fearless and thorough. The Drake committee appointed by the legislature to investigate the affairs of this county, reported as a result of their work that the defendants in these cases had received as interest on the county funds at least \$67,370.81 (see agreed statement of facts, paragraph 8). While the investigation before the grand jury was going on, Mr. Rulison with the help of all the assistants in his office, by means of arduous work by night and day, including Sundays, obtained evidence which showed the receipt by these defendants of \$127,137.81 (Id., paragraph 9).

Not yet satisfied, Mr. Rulison employed an expert accountant, who, with his assistants, worked night and day under the direction and advice of Mr. Rulison until it was disclosed that the total sum received by these defendants amounted to \$211,076.29 (Id., paragraphs 10 and 11). Later an additional sum was found to be due, making a total of \$214,298.76 (Id., paragraph 15).

But conceding that this work was done by Mr. Rulison with fidelity and energy, which no one can question, still he was bound to do it as the public prosecutor, for it was his duty to lay before the grand jury all the evidence in these transactions in case that body should see fit to return indictments. The reason why he was bound to put in all the evidence will be given.

It has been argued by Mr. Rulison's counsel that after the grand jury had found that \$127,137.81 had been received by the treasurer and ex-treasurers from the banks, Mr. Rulison could have used this as evidence in a prosecution just as well as a larger sum, so that his duty as prosecuting attorney in the collection of evidence ended there, and he was not bound to go further; that in cases of embezzlement, it is customary to select one clearly established item of taking and rest the prosecution upon this alone, leaving out all other takings, because the case is thus simplified and more easily understood by a jury, conviction is more likely to follow, and the punishment for the one item satisfies the demands of justice.

It is true that this is the usual and best course in cases of ordinary embezzlement; and if the receiving of the money from the banks by these defendants could have been prosecuted under the ordinary statutes defining embezzlement, then Mr. Rulison would have done his full duty as prosecuting attorney when he had disclosed one or two clearly proved takings upon which to base an indictment. Beyond this he need not have gone to secure a conviction; and if he had dug deeper and disclosed large additional sums due to the county, it might well

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have been said that in so doing he was performing a duty not called for in his capacity as a prosecutor.

But one of the sections of the statutes—Rev. Stat. 6841 (Lan. 10448)—which defines what constitutes the embezzlement of public money, provides for the punishment of this crime not only a term of imprisonment in the penitentiary, but also a fine in double the amount of money and other property embezzled, which fine shall operate as a judgment at law on all of the estate of the party sentenced.

If a prosecution against these defendants were based upon Rev. Stat. 6841 (Lan. 10448), then it would be necessary to insert in the indictment the entire amounts received from the banks by each defendant while acting as county treasurer. Unless these amounts were set forth in the indictments, the amounts could not have been offered in evidence against the defendants, the proper extent of the fines to be imposed could not have been determined by the court in case of conviction, and no judgments against the estate of the person sentenced could have been entered.

It was part of the duty of the prosecuting attorney therefore to find just what these amounts were to their fullest extent, and if the grand jury found true bills, to have these amounts incorporated in the indictments when they were presented to the foreman of the grand jury to be indorsed with his signature.

The grand jury did not see fit to find true bills in these cases. Their reasons for not doing so were set forth in a report to the court. That report is part of the records of the court and is now public history. What those reasons were we are not concerned with here. No opinion is expressed here as to whether or not it was practicable to bring prosecutions under Rev. Stat. 6841 (Lan. 10448) against all the persons involved in these various transactions. But in whatever light the matter may be viewed, it still remains true in the opinion of the court that the transactions were properly taken before the grand jury, and that that body was entitled to be informed of the entire amounts received by the treasurers from the banks for the use of the deposits. If \$87,000 additional, paid by the banks to the treasurer and the ex-treasurers, was found by Mr. Rulison with the assistance of experts after the grand jury had got through with its inquiries, then Mr. Rulison simply failed to get all the facts before that body. This is not said in a spirit of blame. Mr. Rulison did praiseworthy work in getting as much truth as he did before the grand jury. It would have been considerable expense to the county, no doubt, to have held the grand jury in session while experts worked upon the books. But whatever the objections may have been, it still remains true that it was the duty of Mr. Rulison to have put before the grand jury the entire

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amounts received from the banks by these defendants for the reasons given.

For the discovery of this additional sum of \$87,000 by Mr. Rulison after the grand jury had ceased their investigations, Mr. Rulison is not entitled to compensation in the opinion of the court any more than he is entitled to be paid for the discovery of the \$127,137.81 which was brought out while the grand jury was in session.

* * * * *

There were services performed by Mr. Rulison, however, for which he is entitled to be paid. He made demands upon these defendants from time to time as the amounts disclosed by the investigation grew in size; he consulted with their attorneys; and he collected and handled with accuracy and care this enormous sum of money. He placed the money where it earned interest while it was in his custody; he brought these suits against the defendants because the money could be legally got into the treasury in no other way; and finally he safely paid the entire sum with interest accrued into the treasury of the county.

Upon the question of payment, the committee in their report say: "We believe that his compensation should be fixed, if the court determine that he is entitled to compensation, not by a percentage upon the amounts recovered, but by an allowance for time somewhat commensurate with the value of his time as valued by the legislature in fixing his salary."

Mr. Rulison got about \$6,300 during the year 1906. To argue that because Mr. Rulison got \$6,300 for a year's work in the prosecution of felonies for the county, that his time is, therefore, worth just about the same when he comes to act for the county as its legal representative in civil cases of unusual importance, is not sound. First, because the former kind of work is of a much cheaper sort from a lawyer's standpoint than the latter kind; and second, because Mr. Rulison's salary is his annual retainer from the county, and it is not fair to judge the value of a lawyer's time by the size of an annual retainer. If the committee's rule were to be followed, Mr. Rulison would be entitled to not over \$200 for his services in collecting \$214,998.76.

Some of the lawyers introduced as witnesses by the committee, testified that if Mr. Rulison was entitled to legal compensation at all, that his services, excluding all work done by Mr. Rulison in his capacity as prosecutor, were worth \$3,000. One lawyer fixed the fee at \$1,000. No witnesses upon this point were called by Mr. Rulison, the evidence in his behalf being in the form of fifteen affidavits referred to above and now ruled out by the court as incompetent; so that there is no evidence in the case upon Mr. Rulison's side of this question.

But the court has the right to use its own judgment in such a matter, and to the court it seems that even \$3,000 is not fair payment to

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Mr. Rulison for the services in question. No honest and reputable member of the bar would collect \$214,998.76 in three different cases from three different defendants, the collection of the money involving the determination of legal questions and negotiations with able opposing counsel, and the payment of the fee being contingent upon the amount collected, for twice \$3,000. In the opinion of the court, \$7,500 would be a fair allowance for the work done.

The court regrets that many arguments advanced by counsel upon both sides must be passed without notice in this opinion. All have been considered, but the limits of the written opinion will not admit of their discussion here.

One point, however, made by one of the committee in his oral argument ought to be noticed. The argument was made, that public policy forbids the payment of a prosecuting attorney for getting back money that is turned into his hands to stop the finding of indictments.

That is true, but it is not put strong enough. Not only should he receive no pay; he ought to be put into the penitentiary. Even the taking of money from embezzlers in good faith by public prosecutors to repay to its owners, when the prosecution of the offender was still pressed with vigor notwithstanding the return of the money, has always met the disapproval of the judges as a practice likely to lead to corruption. A public prosecutor ought not to turn his office into a collection agency. In a case like this, however, where the money taken was public money and the law requires the prosecuting attorney to collect it, he ought to obey the law. If the grand jury failed to return true bills in these cases because the money was paid back, this was wrong on their part. Still it is not a reason for refusing payment to Mr. Rulison for work done unless he influenced the grand jury to violate their oaths, which no one has charged against him.

One other thing may be referred to. It has been mentioned, if not advanced as an argument, that at the time Mr. Rulison was doing this work he stated to the reporters that he did not intend to ask for pay. This fact cannot affect his legal right. If a man were to sue for a debt and an answer was filed alleging that the plaintiff had once said he did not intend to collect the debt, a demurrer to the answer would have to be sustained.

An order that Mr. Rulison be paid the sum of \$7,500 will be made, with all his expenses in the premises; and the costs of this motion will be taxed against the fund collected.

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ADVERSE POSSESSION—BOUNDARIES.

[Van Wert Common Pleas, August 30, 1906.]

*J. W. WILSON ET AL. v. GEORGE SIDLE ET AL.

1. ESTABLISHED FENCE AS EVIDENCE OF BOUNDARY.

Partition fences established while the original monuments were in existence and recognized by the adjoining owners as being on the line is better evidence of the true boundary than surveys made after the original monuments have been lost.

2. ADVERSE POSSESSION OF PART OF BOUNDARY GIVES TITLE TO WHOLE.

Possession of disputed land at one end of the boundary of two lots being adverse for the prescriptive period, the title acquired extends the whole length of the lot, and a temporary vacancy caused by moving off an old building and erecting a new one does not constitute an interruption of possession when there is no intention to abandon possession.

[For other cases in point, see 1 Cyc. Dig., "Adverse Possession," §§ 149-157.—Ed.]

[Syllabus approved by the court.]

Dailey & Allen, for plaintiffs.

T. J. Trippy and W. F. Corbett, for defendants:

Neighborhood report cannot contradict record evidence. *McCoy v. Galloway*, 3 Ohio 282 [17 Am. Dec. 591]. 1 Greenleaf, Evidence Sec. 145.

None of the witnesses are disputed and the facts so testified to, must therefore be taken as established. *McAllister v. Hartzell*, 60 Ohio St. 69 [53 N. E. Rep. 715].

Effect of party wall agreement, and the rights of the defendants thereunder in equity. *Willoughby v. Lawrence*, 116 Ill. 11 [4 N. E. Rep. 356; 56 Am. Rep. 758]; *Hall v. Geyer*, 7 Circ. Dec. 436 (14 R. 229).

MATTHIAS, J.

This is an action in ejectment. The plaintiffs seek to oust the defendants from the possession of a strip of land twenty-one inches in width off the north end of the south half of in-lots Nos. 63 and 64 in the original plat of the village (now city) of Van Wert. Plaintiffs say that they are the owners of said strip, being seized in fee simple thereof, and that the defendants unlawfully keep plaintiffs out of the possession of said premises.

The answer of defendants contains three separate defenses: (1) A general denial; (2) The statute of limitations as a bar; (3) A contract entered into January 19, 1888, between the defendant, G. W. Sidle, then the owner of the south half of the north half of said lots, and G. M. Saltzgaber, then the owner of the north half of the south half of said lots Nos. 63 and 64, whereby it was agreed that in erecting a brick

*Error not prosecuted.

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building, then about to be erected by Sidle on his said premises, the south wall thereof, which was to be twelve inches in width, should be constructed on the line between said lots, so that the half thereof should rest upon the premises of said Saltzgaber, and that the said Saltzgaber, his heirs and assigns, should have the privilege of using said wall upon the payment of the reasonable value of the same; that thereupon, said Sidle constructed a two-story brick building with the south wall thereof, a twelve inch brick wall, on and along the line between the lands so possessed by the said Saltzgaber and the said lands of the defendant, Sidle, with six inches thereof resting and standing upon the lands so possessed by said Saltzgaber; that the premises then possessed by Saltzgaber were by mesne conveyances transferred and conveyed to the plaintiffs herein; that the defendant, Anna Sidle, acquired and holds title from and through the defendant G. W. Sidle; that since said time defendants have maintained said party wall so constructed, and that such possession and occupancy by said wall has been open, visible, notorious and continuous, and that plaintiffs have had at all times full notice and knowledge thereof.

The reply denies the averments of the answer. By agreement a jury was waived and case submitted to the court.

For the purpose of establishing the boundary line between the north half and the south half of said lots Nos. 63 and 64, the plaintiffs measure from the corner of an iron column in what is known as the Kauke building, at the corner of Main and Washington streets. The measurements made by the surveyors, Giffin, Beatty and Ballard, using that iron column as a starting point show that the south line of the defendant's brick building is twenty-one inches south of the middle line of said lots Nos. 63 and 64.

It is conceded that the iron column referred to is not an original monument, nor is it the perpetuation of an original monument. The original monument of the plat of Van Wert was located at the southeast corner of the public square, which the record informs us was 132 feet by 148½ feet, being the lots upon which the courthouse now stands. "At the southeast corner thereof," the record reads, "is planted a white stone about four by ten inches, for making future surveys from." This original plat was made in 1835. In lots Nos. 63 and 64 were part of the original plat, as was also in lot 25 upon which the Kauke building was constructed in the year 1861. It appears from the evidence that the original monument above referred to was then standing at the southeast corner of the court yard, but when it disappeared we are not informed.

It appears that for some years the Kauke corner has been used by surveyors as a starting point for surveys and measurements, although there is no evidence that such corner was so located and established by reference to the original monument. The first, and in fact the only,

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record showing the use of the iron column at the Kauke corner as a monument for surveys, is the record of the Frisbie addition, surveyed and platted in 1873, where it is said that—

“The starting point from which this addition was surveyed and laid out and with which it corresponds, is on the north line of Main street and east line of Walnut street, at the southwest corner of lot 35 in the original plat of said town of Van Wert, which point is recognized as a point to make surveys from in said original plat and in accordance with the survey of this addition. Said southwest corner of said lot 35 is situated sixty rods, two feet and six and one-half inches east of the southwest corner of the base of the iron column in the southwest corner of the brick building erected on lot No. 25 in said original plat.”

We agree with the suggestion made that the fact that the Kauke corner was established and said building erected while the original monument still remained gives rise to a presumption that such corner was located with reference to said original monument, and we find authorities to support this view, from some of which we shall quote further along. It should be observed, however, as we go along, that all that is said upon the subject by the authorities to which we shall refer, is as well applicable to the contention which the defendants make, that a similar presumption favors the location of the line claimed by them, for it appears from the undisputed evidence that prior to 1865, a board and post fence extended east and west on a line between the north half and south half of said lots, and that upon the line of such fence the former as well as the present building was constructed.

In *Beaubien v. Kellogg*, 69 Mich. 328, 333 [37 N. W. Rep. 691] it is said:

“Ancient fences used by a surveyor in attempting to reproduce an old survey are strong evidence of the location of the original lines, and, if they have stood for twenty or thirty years, should be taken as indicating such lines as against evidence of a survey ignoring such fences, and assuming a starting point at a certain street because agreed upon by surveyors as the true line.

“It will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line located and fixed by the original survey and upon which parties may have acted and made valuable improvements.

“In the absence of original monuments, evidence is admissible to the location of lots and blocks, and lines and corners of lots and blocks thereby established as indicated by old fences, old buildings and the streets as laid out and used for many years, and stakes and monuments established by former surveyors.” *Madison (City) v. Mayers*, 97 Wis. 399 [73 N. W. Rep. 43; 40 L. R. A. 635; 65 Am. St. Rep. 127]. See,

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also, *Diehl v. Zanger*, 39 Mich. 601; *Hoffman v. Port Huron (City)*, 102 Mich. 417 [60 N. W. Rep. 831]; *Stewart v. Carleton*, 31 Mich. 270; *Case v. Trapp*, 49 Mich. 59; *Racine (City) v. Emerson*, 85 Wis. 80 [55 N. W. Rep. 177; 39 Am. St. Rep. 819]; *Gilman v. Brown*, 115 Wis. 1 [91 N. W. Rep. 227]; *Lieberthal v. Montgomery*, 121 Mich. 369 [80 N. W. Rep. 115]; *Welton v. Poynter*, 96 Wis. 346 [71 N. W. Rep. 597].

While we do not find it necessary to decide the question as to whether the monument at the Kauke corner has such a presumption in its favor as to warrant its use as a starting point for surveys in the city of Van Wert, because of other questions appearing in this case, yet we have attempted to go into the question for the reason that it has been a rather mooted one. The same question has appeared in other controversies which have found their way into this court, and I think, invariably the matter was left undecided and unsettled. All the authorities agree that under circumstances such as presented in this case, it is the duty of the surveyor not to determine the location of lots or lot lines by an absolutely accurate survey; that the question is not how an accurate survey would locate them, but how the original stakes located them. No rule is more inflexible in real estate matters than that monuments control course and distance. Justice Cooley, in *Diehl v. Zanger*, *supra*, says, page 605:

"The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campan, and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known."

But it is also said by the same eminent justice:

"As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of the lot actually are."

It will be seen that the rule thus clearly stated under the evidence appearing in this case, probably justifies the use of the Kauke corner as a monument from which to make measurements and surveys; but if measurements made from that corner, from that monument, conflict with the lines of lots also in the original plat of the town fixed and established at about the same time, and fences constructed to mark such lines, why should the one have preference? The same evidence which shows that said original monument remained in its place at the corner of the court yard after the Kauke corner was located, shows also that it was there after the time when, according to positive evidence, the fence marking the disputed boundary was located and constructed. It appears, further, that a stake was planted at the last named location

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at the west end of said fence, which stake was pointed out to Mr. Sidle at or prior to the time of his purchase of said premises. The fence was constructed some time prior to 1865, and was maintained until 1883, or rather a part of it, possibly half across the lots, frame buildings having been placed upon the north lot, which belonged to Longworth, and extended to the line of said fence. In 1865 and for some years thereafter, the north half of said lots belonged to Longworth and the south half to Clark. From 1865 until 1873, Longworth lived on his part of said lots, and said fence extended, we are told by Mrs. Longworth, across the lots dividing their portion from that of Mr. Clark. Just when any portion of said fence was removed or was destroyed, and said buildings placed on the Longworth lot is not disclosed. We find them there in 1882.

The following year said premises—that is, the south third of the north half of said lots—was purchased by defendant, G. W. Sidle, from Longworth. At that time two small frame buildings occupied the front of said premises and extended to the disputed line, possibly beyond. At some time prior to that, a brick building had been erected upon the middle third of the north half of said lots. This is known as the Alexander lot. In 1883, Sidle caused to be constructed a frame building in the rear of his south room. This room was from twenty-five to twenty-nine feet in length, the old room in front of it being probably fifteen feet east and west. At the time said room was erected it was so located that the south wall thereof, was twenty-four feet south of the Alexander building and in line with the remainder of said fence. It further appears that in the rear of the Sidle lot, possibly ten or twelve feet from the east end thereof, stood an ice house which was also on a line with said fence and from which the fence extended east some distance. Thus according to the evidence, was the Sidle lot occupied and used until the year 1888, when the frame buildings, except the ice house, were removed to make place for the brick business building which now stands on said lot, eighty feet east and west. It appears from the evidence, that the stake before referred to, was found in 1888 when the excavation was made for the south wall of the brick building and that it stood twenty-four feet south of the Alexander building.

Thus it appears that the line claimed by Sidle and his predecessor in title as the line between the north half and the south half of said lots was the line of the old fence—twenty-four feet south of the Alexander building—and that such line was claimed together with some occupancy or visible sign of such claim from 1865 until the present time. The measurements made by the surveyors and shown upon the plat introduced in evidence by the plaintiffs, rather supports the defendants in this contention that such has been claimed and considered to be the true line, if not acquiesced in. This plat shows that, whereas the original

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plat of Van Wert indicates that the lot on the corner of Main and Washington streets is but 132 feet, its south line as built upon and occupied is .85 of a foot further south. It further shows that the alley is but .05 of a foot short of its platted width; that the building next to the alley occupies .66 of a foot more than its twenty-two feet, while the Alexander building occupies but 20.17 feet. It appears from the evidence, that when the Alexander building was erected a strip two feet wide was left on the south side thereof for the purpose of a joint stairway; further appears that such arrangement was carried out, and that a joint stairway was constructed when the Sidle building was erected by which access is had to the second floor of the Alexander as well as the Sidle building, there being a front as well as rear stairway and a hall the full width of four feet the entire length of the buildings east and west on the second floor. If we take this fact into consideration, and we think it must be considered, then we find that this 1.83 feet, which it is said is the distance the Sidle building is too far south, is exactly the extra space used and occupied by buildings north of the Sidle building. For the purpose of showing this more fully, let us take first the distance as shown by the original plat of Van Wert, commencing at the Kauke corner.

Platted distances.

Main street	82.50
In-lot No. 54	132.85
Alley	16.5
North half of 63 and 64	66.

Measurements of lots as occupied.

Main street	82.40
In-lot No. 54.....	132.85
Alley	16.45
First building on 63 and 64	22.66
Alexander building	20.17
From Alexander wall to south line <i>Sidle</i> building.....	24.30
	<hr/>
	298.83
	297.00
	<hr/>
	1.83

I have said that these measurements serve to support the contention of the defendants that the line has been claimed and maintained where the south line of their building now stands, or rather six inches north thereof. Let us note the fact that although lot 54 takes .85 of a foot (or 10.2 inches) more than the original plat gives it, yet the alley next south loses but .05 of a foot (.3 of an inch); thus it is seen that the alley

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line, according to this measurement, would be practically ten inches further south than it should be according to the original plat. We are not enlightened by the evidence adduced as to the time of occupancy of said lot 54 or when the building was erected thereon, or when the building was erected next south of the alley, nor the one on the Alexander lot. We only know that the Alexander building was erected before the Sidle building. But from the evidence before us we think we may presume that the lot fronting upon Main street was built upon first, and lots near thereto before those further away, and that as this was done lines were established, fences erected thereon, and later buildings erected in accordance with such lines. If then a mistake was made in the measurement of lots next to Main street, giving them more than they were entitled to according to the original plat, does it not seem quite probable that the line between these lots was established when and where claimed by the defendants? According to the measurements above stated the Alexander building and the Sidle building together occupy just .03 of a foot less than the 44 feet to which they are entitled.

If the extra space given lots next to Main street was not the result of mistake in measurement but rather of appropriation by the owners of the lots, then does it not still seem quite probable that owners of lots should locate their property lines by measurements from lines theretofore established and marked? This especially in view of the fact that the monuments from which such measurements would be made were north of said lots. We think such presumptions may be indulged and such conclusions rationally drawn from the evidence.

This brings us back to the rule laid down by Justice Cooley, which we find is adopted and followed by other authorities cited:

"As between old boundary fences and a survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of the lot actually are."

As supporting our conclusions in this regard we also refer to *Welton v. Poynter*, 96 Wis. 346 [71 N. W. Rep. 597], where it is said:

"The presumption that a fence which has stood for thirty years is located on the line of the original survey is not overcome by the fact that upon a resurvey based upon no original monument another line is established."

Also,

"A boundary line long recognized and acquiesced in is generally better evidence of where the real line should be than any survey made after the original monuments have disappeared." *Tarpenning v. Cannon*, 28 Kan. 665; *Hoffman v. Port Huron*, 102 Mich. 417 [60 N. W. Rep. 831].

This brings us to the claim of adverse possession, and we are of opinion that such defense is well asserted and established in this case,

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even if the line in dispute be located according to the survey now made. The facts show that the line established and claimed from 1865, was twenty-four feet south of the Alexander wall. Defendants and their immediate grantor had held possession to that line from 1865, so that such title ripened in 1886, prior to the removal of any buildings from the Sidle lot. But it is contended that the evidence does not show that Sidle's building and fence extended the entire length of the line, and, that therefore, there was not the hostile and exclusive possession required to result in a bar by the statute of limitations.

It is a rule generally recognized that one in possession can acquire title by adverse possession only of the land actually inclosed and occupied by him unless he have color of title, but that if a man enter a tract of land and under deed duly recorded, although from one having no legal title, and has a visible occupation only of part of it, the true owner is disseized of the whole tract. Said in *Humphries v. Huffman*, 33 Ohio St. 395, 404, that:

"The ground upon which the doctrine of constructive possession is based is, that one in possession, claiming by metes and bounds under a paper title, and openly and notoriously exercising control and dominion on the land, is presumed to be doing so to the extent of his claim. * * * The occupancy must be such as to give notice to the real owner of the extent of the adverse claim."

This is undoubtedly the correct rule to apply in the case at bar. Defendants' deed calls for the south third of the north half of the said lots. Under this deed they have claimed their south line to be twenty-four feet south of the Alexander wall and extending east and west. The description, together with the plat, shows that wherever the disputed line is, it is a line due east and west without curves or jogs, and hence occupancy to the line claimed both in front and rear was such occupancy as to give notice to the owners of the south half of lot that the adverse claim extended entirely across the lots.

"The principle upon which the limitation operates, is, that the adverse claim is accompanied by such an invasion of the rights of the opposite party as to give him a cause of action, which he has failed to prosecute within the time limited by law, and which he is therefore presumed to have surrendered or abandoned." *Clark v. Potter*, 32 Ohio St. 49, 63; Angell, Limitations 390.

We think this view is not inconsistent with any reported Ohio case, and we find it supported by the Supreme Court of Iowa in the case of *O'Callaghan v. Whisenand*, 119 Iowa 566 [93 N. W. Rep. 579], a comparatively recent case, having been decided in 1903.

Owners of adjoining business lots in the city of Des Moines joined issue as to the location of their boundary line, the difficulty having grown out of conflicting surveys. Defendant's grantor, in 1873, erected

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a business building upon this lot, locating his wall according to a survey then made. In 1890, plaintiff came to erect a new building on his lot, employed an engineer, who upon survey determined that defendant's building was over the line, whereupon action was brought. We quote from the text of the decision:

"If he" plaintiff "intended to question the correctness of the location of the line he should have acted within ten years after he knew that Bird (defendant) was claiming and exercising the right of possession to that line. Even though the original occupancy on the part of Bird (the defendant's grantor) was by mistake, yet from the time that he definitely fixed upon this line as his boundary line, and asserted the right to possession with reference thereto, his occupancy was up to that particular line, and not up to some imaginary line, which might afterwards, by survey, be established as the correct line according to the original survey and plat. In other words, his possession was not from that time on by reason of any mistake, but by reason of the contention that that was his boundary.

"It is further contended by plaintiff, however, that the permanent building erected by Bird (defendant's grantor), on what he believed to be his eastern boundary line did not extend the entire length of the boundary, and that as to the line beyond the building there has been no such adverse possession or acquiescence as to conclude the plaintiff. We see no merit in this controversy. It is clear that the boundary line was supposed to be a straight line, and that it was established by the wall of the permanent building as effectually as though the building had extended the entire length of the line. There is no contention that there should be any jog or offset in the boundary between the two lots. When Bird's building was constructed on the boundary line as he claimed it to be for a considerable distance, he was asserting right of possession to that straight line as effectually as though his building had covered the entire depth of his lot."

In the case before us, to repeat some of the evidence, it appears that the line claimed by the defendants was for many years marked by a fence extending across the lots and that a part of the fence remained for more than twenty-one years, marking the line claimed and along which the frame, and afterward the brick building, was located. The occupancy was such as to give notice of the extent of the adverse claim.

But it is urged that in 1888 Sidle and Saltzgaber entered into a contract whereby it was agreed that the south wall of the Sidle building was to be so located that it would extend but six inches south of the middle line of said lots, and that any rights theretofore acquired by Sidle were thereby surrendered. This contention is met by the rule that the location of the line is to be determined by the fence and stake

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referred to, rather than by measurements made now from a point other than the original monument. Upon this point in addition to authorities previously cited, we call attention to *Corey v. Ft. Dodge (City)*, 92 N. W. Rep. 704 [118 Iowa 742], where it is said [in substance]:

“The fact of possession becomes of importance when the fact is considered that none of the original monuments, if any, marking the location of the block or street in dispute, has been preserved; and that no living witness is able to identify the place where such monuments were platted. * * * There attaches to the lines so long recognized a presumption of correctness, which, if not conclusive, is to be overcome only by clear and satisfactory proof.”

It is clear that Sidle then considered the boundary line referred to in said contract to be as he had theretofore, and has since claimed to be, and where title has become perfect by adverse possession for the statutory period, it is not lost by an admission by the holder that the possession was not adverse, although the admission be in writing, or by an agreement to join in a survey. 1 Cyc. 1139; *Lamoreaux v. Creveling*, 103 Mich. 501 [61 N. W. Rep. 783]; *School District No. 4 v. Benson*, 31 Me. 381 [52 Am. Dec. 618]; *Austin v. Bailey*, 37 Vt. 219 [86 Am. Dec. 703].

Even if the adverse possession had not continued for twenty-one years, prior to 1888, which we think clearly it had, still the temporary vacancy when moving off the old and erecting new buildings would not constitute an interruption of possession, when there was no intention to abandon possession. 1 Cyc. 1021; *Clark v. Potter*, 32 Ohio St. 49, 65.

The conclusions reached and above announced, we believe to be in complete harmony with the latest reported decision of the Supreme Court of this state upon the subject of adverse possession—that of *McAllister v. Hartzell*, 60 Ohio St. 69 [53 N. E. Rep. 715].

Upon the issues joined we, therefore, find for the defendants and dismiss the petition herein, and assess the costs to the plaintiffs.

King, In re.

TRUSTS AND TRUSTEES.

[Licking Common Pleas, September Term, 1906.]

IN RE MARY A. KING.

INDEFINITE TRUST LEFT TO BE EXECUTED AT DISCRETION OF TRUSTEE NAMED CEASES AT DEATH OF NOMINEE AND LEGACY LAPSES.

A bequest in a will of a sum of money to the son of the testatrix as trustee, "for the purpose of being applied by him toward defraying the expense of the education for the Christian ministry of such indigent and worthy young man as he, in his best judgment and discretion, may select," creates a trust to be executed by the trustee named in the will only, and, on his death without exercising the power of selection conferred by the will, the legacy lapses and becomes subject to distribution, there being nothing in the will to indicate that the trust may be executed by an appointee of the court as successor to the trustee named.

[For other cases in point, see 7 Cyc. Dig., "Trusts and Trustees," §§ 81-98.—Ed.]

[Syllabus approved by the court.]

F. M. Black, for himself as trustee.

J. H. Jones, for heirs:

The bequest has lapsed because the trustee did not make the selection in his lifetime. Page, Wills 720 Par. 619; *Hadley v. Hadley*, 147 Ind. 423 [46 N. E. Rep. 823]; *Tilden v. Green*, 130 N. Y. 29 [28 N. E. Rep. 880; 14 L. R. A. 33; 27 Am. St. Rep. 487]; *People v. Powers*, 147 N. Y. 104 [41 N. E. Rep. 432; 35 L. R. A. 502]; *Johnson v. Johnson*, 92 Tenn. 559 [23 S. W. Rep. 114; 22 L. R. A. 179; 36 Am. Rep. 104], *Fifield v. Van Wyck*, 94 Va. 557 [27 S. E. Rep. 446; 64 Am. St. Rep. 745]; *Gambell v. Trippe*, 75 Md. 252 [23 Atl. Rep. 461; 15 L. R. A. 235; 32 Am. St. Rep. 338]; *Young v. Young*, 97 N. C. 132 [2 S. E. Rep. 78]; *Miller v. Teachout*, 24 Ohio St. 525; *Sowers v. Cyrenius*, 39 Ohio St. 29 [48 Am. Rep. 418].

The beneficiary is too indefinite. *Gambell v. Trippe*, 75 Md. 252 [23 Atl. Rep. 461; 15 L. R. A. 235; 32 Am. St. Rep. 338]; *Fairchild v. Edson*, 154 N. Y. 199 [48 N. E. Rep. 541; 61 Am. St. Rep. 609]; *Tilden v. Green*, 130 N. Y. 29 [28 N. E. Rep. 880; 14 L. R. A. 33; 27 Am. St. Rep. 487]; *Van Kleeck v. Reformed Prot. Dutch Church*, 20 Wend. 457; *Van Nostrand v. Moore*, 52 N. Y. 12; *Kiah v. Grenier*, 56 N. Y. 220; *Holland v. Alcock*, 108 N. Y. 312 [16 N. E. Rep. 305; 2 Am. St. Rep. 420]; *Bristol v. Bristol*, 53 Conn. 242 [5 Atl. Rep. 687]; *Maught v. Getzendanner*, 65 Md. 527 [5 Atl. Rep. 471; 57 Am. Rep. 352]; *O'Hara, In re*, 95 N. Y. 403 [47 Am. Rep. 53]; *People v. Powers*, 147 N. Y. 104 [41 N. E. Rep. 432; 35 L. R. A. 502]; *Johnson v. Johnson*, 92 Tenn. 559 [23 S. W. Rep. 114; 22 L. R. A. 179; 36 Am. St. Rep. 104].

SEWARD, J.

This is a petition by a trustee to construe a clause in the will of Mary A. King.

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The record discloses that Mary A. King died testate some years ago, and nominated and appointed William A. King her executor or trustee under the will. In that will there is a clause—and it is the only clause to which the court need give any attention—which reads as follows:

“I give and bequeath to my son, William A. King, the sum of \$1,000 in trust for the purpose of being applied by him towards defraying the expense of the education for the Christian ministry of such indigent and worthy young man as he in his best judgment and discretion may select, and I make the payment of this bequest a charge on any real estate of which I may die seized in fee.”

Frederic M. Black was appointed trustee after the death of William A. King, and files this petition seeking the court's direction as to what to do with this fund. The fund is about \$1,000, I believe. I don't remember as to that. I think it is about \$1,000.

And the heirs of Mrs. King file an answer alleging that this legacy lapsed and became a part of the estate of Mary A. King for distribution.

That is the question that the court has to determine. William A. King died in 1897. Upon his death the petitioner, Frederic M. Black, was appointed trustee, and he asks the construction of the court as to this clause in the will. William A. King died without having carried out this provision of the will.

It is claimed on the part of the defendant:

First. That William A. King failed to make a selection of the person to be educated, and that therefore the bequest lapsed.

Second. That it lapsed by reason of indefiniteness in the beneficiary.

It will be observed that that which is indefinite in the will may be made definite by selection by the trustee appointed by the testatrix. A fair construction would indicate that the testatrix had no particular person in view. She had in her mind the expounding of the Christian religion. This was evidently her ultimate object. She left the means to accomplish the object to the selection of William A. King; the selection of the person to be educated, and in that way to reap the benefits of the bequest, was left to the best judgment and discretion of William A. King. She entrusted him with the power of making the selection. She does not attempt to bestow this charity on any particular person, but she leaves those matters with him, upon whose judgment she was willing to rely.

Who could claim the right to have the bequest applied to his benefit under this will? Is there any person who could come into court or go to the trustee and claim the right to have the benefit of this bequest in this will? It is so indefinite in that regard that the court does not think there is any person. What must be his religious or denominational persuasion? She evidently had some religious denomination in mind,

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but the will did not give expression to it. She could well leave that to the trustee whom she selected to carry out this bequest. The court has no hesitation in saying that if William A. King had made the selection, that which was theretofore indefinite would, by the act of selection, have become definite. But he did not. What effect, therefore, does his failure to make the selection have upon the bequest? If William A. King had made the selection of some indigent young man and in some certain manner designated him, then a different question would have been presented, although he had not carried out the bequest as to the particular young man he had selected.

Many cases have been cited in the exhaustive and well-prepared briefs of counsel, and the court has examined those within reach. The first case cited by the plaintiff is *Sowers v. Cyrenius*, 39 Ohio St. 29 [48 Am. Rep. 418]. This is a case where a testator died bequeathing a certain fund to the propagation of the Gospel of what is known as the Disciples Church, and appointing three trustees to carry the bequest into execution. One of the trustees resigned; another moved to a foreign city, and the other still remained as trustee. The court appointed two trustees to act with the one nominated in the will, to carry the bequest into execution, and they brought suit asking for a construction of the will. The syllabus is as follows:

“1. A residuary clause in a will in these words: ‘At the decease of my wife, Esther, I give and bequest all my estate, real and personal, for the preaching of the Gospel of the blessed Son of God, as taught by the people known now as Disciples of Christ.’” Here he selects the denomination. “‘The preaching to be well and faithfully done in Lorain county in Birmingham, and at Berlin in Erie county, Ohio, and I nominate and appoint John Cyrenius, Silas Wood and Samuel Steadman executors of this my last will and testament, and I request them to do the business without remuneration,’—creates a valid trust which will be enforced in a court of equity.”

The court say at the bottom of page 35 and the top of page 36:

“It is no objection to the validity of the trust that the individuals to be benefited by it are not designated in the will, for this indefiniteness is a necessary characteristic of charitable trusts. It is only required that discretionary power to use the property for the purposes intended by the testator should be given to trustees appointed by him, or by the court. In this instance that power has been plainly given by the testator to the persons named as executors of the third item of the will. Although the language of the will might have been more definite, the intention is clear and the trust valid.

“It is next insisted that the estate was not devised, nor intended to be devised, to the trustees. It is true that the estate is not devised in express terms, but the weight of authority is in favor of the proposition

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that courts will by construction imply an estate in trustees, although none is given them in words, in cases where they are required to do something which cannot be done without a legal estate, and that the estate thus implied will be an estate sufficient for the purposes of the trust. In this case, the purposes of the trust obviously require an estate in fee, and that estate would under that rule be implied by construction in the trustees. It is unnecessary, however, to decide whether an estate in fee was taken by the trustees, or not, for even if the legal estate descended to the plaintiff in error, it descended subject to the trust, which could still be enforced against it. * * *

"It is next insisted that the appointment of Parmley and Robinson, as trustees, was invalid. If this were true, the plaintiff in error would not be prejudiced thereby, for the trust might still be executed by Cyrenius, the surviving trustee; but we are of opinion that under the provisions of the act relating to wills * * * the probate court was authorized, in a proper case, to appoint suitable persons to aid in executing the trust according to the will, although there might be a surviving trustee capable of executing it, and that this power was properly exercised in this case. There is nothing in the language of the will to indicate that the power given to the first trustees is a personal trust and confidence that cannot be exercised by others, and there is nothing in the nature of the trust to prevent its execution, in accordance with the intention of the testator, as well by trustees appointed by the court as by those named in the will."

And the court thinks that would be the case in this matter if the testatrix had provided that the person should be selected by William A. King, or by his successor as trustee.

In the case of *McIntire v. Zanesville*, 17 Ohio St. 352, 353, the will directed certain money to be invested in a manufacturing company, the use and profits to be appropriated to the support of a poor school, for the education of poor children. The question involved was as to whether it must be used for Zanesville as it then was, or whether the bequest applied to Zanesville as it was at the time the money was to be appropriated.

In *Miller v. Teachout*, 24 Ohio St. 625, 626, the syllabus is:

"A testator provided in his will that the residue of his estate, which consisted of personal property, after paying legacies, should be retained by his executor and invested by him during the life of his wife for her use, and that at her death it should be appropriated by the executor to the advancement of the Christian religion, and be applied in such manner, as, in his judgment, would best promote the object named. The executor accepted the trust; and during his life and that of the widow, the heir brought suit to annul the will for uncertainty as to the object of the trust: *Held*, that the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its in-

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definite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this state will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise."

The court sustained this trust, and, by inferential reasoning, the court would conclude that they sustained it because the trustee appointed by the will was still living, and able to make the selection.

The court say at the close of the opinion:

"If the trustee shall then fail to execute the trust, or should he abuse his power, or its exercise at any time become impossible, a more proper occasion will arise for the heir, or attorney-general, to invoke the interposition of the courts. The questions that may then arise in connection with the will need not, nor indeed ought they to be, now anticipated."

The defendant cites a great number of cases, among which is *Gambell v. Trippe*, 75 Md. 252 [23 Atl. Rep. 461; 15 L. R. A. 235; 32 Am. St. Rep. 388]. In that case the testator directed in the words following:

I direct my trustees to pay over the whole residue to some Presbyterian institute in Baltimore as they may determine for charitable or religious purposes. Both trustees died before the estate was settled: *Held*, that the power to select beneficiaries was limited to the persons named in the will, and both having died, it devolved upon no one else. Wherever a power is of a kind which involves personal confidence on the part of the testatrix in the trustee, it must ordinarily be understood as confined to the individual so named.

And why is that not the case in the case at bar? She imposes confidence and trust in William A. King to select the beneficiary; she imposes special trust in him for some reason satisfactory to herself. She does not confer that power upon any other person.

The court thinks that this legacy lapsed, and there may be a decree accordingly.

In *Miller v. Teachout*, *supra*, at the bottom of page 535, there is an announcement to the same effect. I intended to have cited that case.

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MUNICIPAL BOARDS—CONTRACTS.

[Cuyahoga Common Pleas, April 7, 1906.]

J. C. BURKE V. CLEVELAND (CITY) ET AL.*1. POWER OF BOARD OF PUBLIC SERVICE TO MAKE CONTRACTS.**

A contract for the construction of a sewer having been properly entered into by the city council and the contractor, the board of public service has power to make a subsidiary agreement as to the manner of carrying out the contract made necessary by subsequent developments, and the limitation on the power of the board of public service to make contracts involving more than \$500 without the action of the city council has reference to original contracts and does not affect the power of the board to make such modifications as it deems necessary in contracts already properly entered into by the council.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 844-867.—Ed.]

2. AUTHENTICATION OF CONTRACTS MADE BY THE BOARD OF PUBLIC SERVICE.

A contract made by the board of public service of a city, signed by the president and clerk of such board is properly executed if such authentication is according to the rules adopted by the board for the execution of its contracts; it is not necessary that all the members of the board sign.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 942-976.—Ed.]

3. FRAUD AS EVIDENCED BY CONSIDERATION.

The price agreed upon for the construction of a sewer being \$60 per foot, the fact that an expert, not taking into consideration several elements that made the work uncertain, estimated the work at \$50 per foot does not show fraud in the contract, there being no direct evidence of fraud.

[Syllabus approved by the court.]

S. Parks, F. J. Cowdry and W. J. King, for plaintiff.

N. D. Baker and Herrick & Hopkins, for defendants.

LAWRENCE, J. (Orally.)

This action has been brought by the plaintiff, J. C. Burke, a taxpayer of the city of Cleveland, on behalf of said city against the city of Cleveland, John Wagner and others, defendants, and the prayer of the petition is for an injunction restraining H. D. Coffinberry, treasurer of said city, from making any further payments to said John Wagner for work done under an alleged contract with the city, and restraining J. P. Madigan, auditor of said city, from drawing warrants, and W. J. Carter, engineer of said city, from certifying estimates for work done under said contract.

On February 10, 1902, one Christian F. Burkhardt entered into a contract with the city of Cleveland to construct Sec. 6 of the intercepting sewer along the right of way of the Lake Shore & Michigan Southern Railway Company, and extending from Doan street, in Glenville, Ohio, to a point 1,750 feet easterly therefrom, in accordance with certain

*Affirmed by Supreme Court, without report, *Burke v. Cleveland*, 51 Bull. 596; 75 Ohio St. 000.

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plans and specifications which provided that said sewer was to be circular in form and thirteen feet, six inches in diameter, and that it should be constructed of concrete and brick masonry in open cut, the sides of said cut to be supported in a substantial and satisfactory manner with two-inch sheeting held in place by substantial cheek and brace timbers, all of said sheeting and bracing to be left in place and paid for at the price bid for sheeting left in place.

The contract stated that the aforesaid right of way was obtained from the Lake Shore & Michigan Southern Railway Company by an agreement incorporated in ordinance No. 23203-a, passed by the city council January 9, 1899, and all the rights acquired by the city for sewer construction purposes under said agreement were by said contract conferred upon the contractor and in like manner he was required to assume all the obligations, precautions and limitations required of the city in the construction of the proposed work, and it was provided that the contractor would be paid for the actual amounts of work done and the material furnished within the limitations prescribed by the specifications, on estimates in writing from the chief engineer and at the various prices bid for the same. Among the prices stipulated to be paid for such work were the following:

For each cubic yard of excavation.....	\$ 80
For each one thousand feet board measure sheeting and bracing in trench.....	14 00

Section 182 of the specifications incorporated in said contract is as follows:

“The work will be done in accordance with the plans on file in the office of the chief engineer, reserving to the city the right to direct and require, by written order only, by and through the chief engineer, thereunto duly authorized, such changes, variations, additions and diminutions, in and about the work as it progresses, as may, in the opinion of said engineer, become necessary by reason of any conditions or circumstances arising or discovered after the making of the contract, and rendering such changes, variations, additions, or diminutions necessary, in the opinion of said engineer, for the safety, stability, efficiency or betterment of the work; and if any such changes, variations, additions or diminutions shall be so ordered and so made, there shall be allowed or deducted on account thereof such sum or sums as, in the opinion of the chief engineer, shall be fair and reasonable, and the decision of said engineer in such case shall be final and binding upon both the city and the contractor.”

This contract was on February 27, 1902, duly assigned by Christian F. Burkhardt to the defendant, John Wagner, and such assignment was accepted by the city. No question is now made as to the validity of the

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original contract or as to the assignment thereof to Wagner. According to this contract the work was to be commenced within fifteen days after notice from the engineer to begin the same, and it was to be completed on or before July 1, 1902. The contractor, Wagner, got ready to enter upon the performance of his contract, but the engineer gave him no notice to begin and in May, 1902, when spoken to on the subject by the contractor, the engineer said that the city could not let him go on because of trouble with the railroad; the matter ran along until April 18, 1904, the engineer giving no order or permission to proceed with the work.

The contract between the city and the railroad company, amongst other things provided in Sec. 4:

"The construction of such sewers under the tracks shall be done in such manner as to permit the railway company to at all times support, maintain and use said tracks."

Section 5 of said contract with the railroad company is as follows:

"The sides or walls of the trench excavated for the construction of said sewer shall be by the city thoroughly and securely protected by sheet piling and bracing so as to render and make it perfectly safe at all times for the railway company to operate its trains over and upon its tracks at their usual rate of speed and in the usual manner, and in case it shall fail to do so, the city shall pay and indemnify said railway company against all damages resulting from such failure."

And Sec. 11 of said contract is as follows:

"All damages to persons or property which may be caused by the construction or maintenance of said sewer on the right of way aforesaid shall be paid by the city."

It seems that work had been begun on section 7 of this sewer, being the section lying immediately west of section 6 and that considerable difficulty was encountered because it was found that the two-inch sheeting was entirely inadequate and that the carrying on of the work caused the tracks of the railway company to settle, resulting in a protest from the engineer of the company. There was also difficulty in connection with the property near the line of the sewer occupied by a chair factory, the proprietor threatening to enjoin the city. Finally the Lake Shore & Michigan Southern Railway Company's engineer demanded that nine-inch sheeting should be used instead of two-inch sheeting. This was tried for a time but the results still not being satisfactory, in 1903 an arrangement was made with the contractor for said section No. 7 to complete the work by tunnel instead of open cut, he being allowed an additional price equal to the extra cost of using nine-inch sheeting instead of two-inch if the work had been done in open cut. In the meantime the railroad company had laid an additional track which came within a few inches of the line of the sewer, increasing the difficulties

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of the situation materially and making it practically impossible to construct the sewer for section 6 if it was to be done in open cut. In April, 1904, the board of public service entered into a subsidiary agreement with Wagner for constructing the sewer in section 6 by tunnel work, but as this was afterwards abandoned and relinquished by both parties I do not think it important to take time to explain that matter. I come at once to speak of the second subsidiary agreement which was entered into between the board of public service and Wagner on January 3, 1905, which is the foundation of this action.

This agreement after reciting the conditions as they existed in connection with the construction of said section 6 on account of the proximity to the railroad tracks and that it was desirable to change the method of construction from open cut to tunnel work, provided that said party of the second part, that is the contractor, has agreed and by these presents does agree to construct the remaining portion of the main intercepting sewer above described in tunnel, the said sewer to be of the size originally contracted for, namely, thirteen feet, six inches in diameter, and to be built of four rings of shale brick, all laid in Portland cement mortar and in Flemish bond where directed, the inner ring to be of No. 1 shale brick and the remaining rings of No. 1 and No. 2 shale brick. And the city of Cleveland on its part agreed to pay said second party, that is the contractor, \$98,250 for the said sewer built in tunnel as herein described, complete in place, including all manholes and other appurtenances, and including cost of connecting up the work now finished at each end of the section herein mentioned, the said tunnel section being about 1640 feet in length and not including the 108 feet just easterly of Doan street already built under another contract.

It was further provided in said agreement that the specifications, except when conflicting with the conditions of this subsidiary agreement are to be the same for the work mentioned in this subsidiary agreement, as are specified for the original work under the original contract.

Immediately after the making of this second subsidiary agreement the defendant, Wagner, entered upon the work in pursuance thereof and at the commencement of this action had completed 646 feet, leaving 978 feet still to be done. The plaintiff seeks to enjoin the making of any further estimates or payments for the work done or to be done under said agreement on three grounds:

1. That the board of public service did not have the power to make such subsidiary agreement.

2. That it was not signed by all of the individual directors of the board of public service.

3. That the price stipulated to be paid for such work was excessive and that this was known to Mr. Springborn when he signed said agreement, and that he and the said Wagner conspired together for the

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purpose of giving the work to Wagner and preventing other contractors from being able to bid on said work.

Section 143 of the municipal code (Rev. Stat. 1536-679; Lan. 3131) provides that,

“Whenever it becomes necessary in the opinion of the directors of the appropriate department in cities, or of the council in villages, in the prosecution of any work or improvement under contract to make alterations or modifications in such contract, such alterations or modifications shall only be made by such directors in cities or council in villages, by resolution, but such resolution shall be of no effect until the price for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor, and the mayor in villages, and the directors of the appropriate department in cities, on behalf of the corporation; and no contractor shall be allowed to recover anything for work or material, caused by any alteration or modification, unless such contract is made as aforesaid.”

In support of the contention that the board of public service did not have power to make said subsidiary agreement of January 3, 1905, plaintiff's counsel insists that the attempted modification of the contract was not a proper modification or alteration of the original contract but was in fact a new contract upon a new subject-matter and contrary to the policy of our law that public contracts shall be let to the lowest bidder. I am not able to agree with this view however. The power is to make alterations or modifications in the contract. A contract comprises the thing to be done or furnished, and the manner of doing or furnishing the same. A modification in the contract clearly may relate to either of these and must relate to one or the other of them. The essential thing is, that the substantial identity of the subject-matter be not thereby changed. Here the principal change was as to the manner of doing the work. The thing to be furnished was a sewer of a designated size, and this is still to be furnished. Whether the work of construction can be carried on to better advantage by means of open cut or by tunnel depends on conditions as they exist when the work is done and may well be subject to change if made in good faith. It is further said that the power of the board to make alterations is limited to such as do not involve more than \$500 in amount. It would follow from this position that there can be no modification at all when the additional cost is more than \$500, for after a contract is once made the councils in cities have nothing more to do with it.

Section 123 of the municipal code (Rev. Stat. 1536-618; Lan. 3093) provides:

“The powers of council shall be legislative only, and it shall perform no administrative duties whatever and * * * all contracts

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requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriations made, council shall take no further action thereon."

It is plain, I think, from an examination of Sec. 143 of the code that the limitation of \$500 has reference solely to original contracts which may be entered into by the directors of public service without any action whatever by the council, and subsequent parts of the section have reference to cases where the expenditure exceeds that sum. In such cases the amount to be expended must be authorized by the council and when this is done the board has full charge of making the contract originally or any subsequent modification therein. The limitation upon the expenditure under the contract as modified is the amount authorized by the council and it is expressly provided that the price to be paid for the work and material under the modified contract shall be agreed upon by the contractor and the directors of the appropriate department.

I am of the opinion therefore that the directors of public service under the statute had power to enter into this subsidiary agreement without any action from the council in respect thereto. The claim of the plaintiff that the subsidiary agreement of January 3, 1905, is invalid because not signed by all the members of the board is based on what strikes me to be a very narrow and technical view of the statute. It is true that it is provided that the agreement shall be signed by the contractor and directors of the appropriate department in behalf of the corporation, and it is said that this language should be strictly construed because the purpose of the statute is to protect the public interests. Undoubtedly the general purpose of the statute is to promote and protect the public interest. The purpose of the particular provision in reference to the signing of the contract would seem to be for the purpose of authentication, and if it were not for the express provision in the subsequent part of the statute that the contractor should not be entitled to recover anything for work or material unless such contract is made as aforesaid, the provisions in reference to the authentication of the contract would be directory only. They are mandatory only because of the express provision that contracts made otherwise are not enforceable.

— I see no reason calling for a strict construction of the language. If we consider the effect upon the contractor, depriving him of the reward for work actually done, and forfeiting his rights in respect to such work, it might be argued that the statute should receive a liberal construction. I prefer, however, to say that the statute should be reasonably construed in view of its language and in view of its object and the consequences resulting from a violation of the statute.

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In Sec. 138 of the municipal code (Rev. Stat. 1536-674; Lan. 3126) it is provided,

“In every city there shall be a department of public service which shall be administered by three or five directors and the number of said directors shall be fixed by ordinance or resolution of council. Such directors shall organize as a board to be known as the ‘board of public service.’ ”

In the following sections, where the statute speaks of the powers of the board and clearly has reference to a board, the language almost always is, “The directors of public service.” For instance in 96 O. L. 66, Sec. 141, it is provided that the directors of public service shall have the management of all municipal water, light and heating plants, etc., and similar language is found in the following section relating to the powers conferred upon the board.

It does not mean here that the individual directors shall have the management of the municipal public works. Clearly the meaning is, that the directors as a board of public service shall have that charge and that management. So that we see under 96 O. L. 67, Sec. 143, following a similar use of the language in each preceding section, the term, directors of the appropriate department, has reference to such officers not individually but officially and as a board.

It is further provided in 96 O. L. 66, Sec. 138, that they, that is, the directors organized as a board of public service, shall make their own rules and all regulations for the administration of affairs under their supervision. It is stated in the answer of the defendants other than John Wagner that the directors of public service did adopt rules whereby contracts were to be authenticated or executed by the president of the board and the clerk. If I am correct in the view that the statute has reference to the directors in their capacity as a board and if the execution of the contract on behalf of the city by the board is an act in that official capacity it seems to me that the manner of execution is properly subject to the rules and regulations which they are authorized to adopt.

I next refer to the charge of conspiracy made against Mr. Spring-born and Mr. Wagner, only to say that there is no testimony tending in the slightest degree to sustain such a charge and I do not understand that counsel for plaintiff now urge the same. There remains then the question whether the amount agreed to be paid for the work under the altered or modified contract is so excessive as to be evidence of an abuse of discretion to such an extent as to warrant a court of equity in setting aside the agreement, resulting not only in putting an end to the contract for the future but in depriving Wagner of compensation for the work already done by him.

In this aspect of the case I am of the opinion that it is immaterial

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as affecting the rights of Wagner whether the officers of the city were sufficiently informed as to the cost of tunnel work or not, or whether they acted carelessly or not. If they had power to act and acted in the manner prescribed by law, if the discretion vested in them was not abused and if Wagner was guilty of no fraud, he may deal with them at arm's length and is not responsible for the extent of the information possessed by them or the investigation made by them. The discretion to agree upon the price to be paid is vested in the board subject to the limitation that the price paid under the contract as modified shall not exceed the expenditure authorized by the council and it is elementary that in such a case official discretion will not be interfered with by the courts except on proof of fraud or of such abuse of discretion as to indicate a want of good faith. The ground then on which an abuse of discretion must be based is the excessive price, if it be excessive, agreed to be paid by the city to Wagner for doing the work in tunnel. Evidently the same rule must apply when we consider this question based upon an excess of price as would be applied if the question related to inadequacy of price or inadequacy of consideration in any case, because the inadequacy of consideration on one side makes the excess of price on the other. Upon this subject I refer briefly to a few cases:

In the case of *Rooker v. Rooker*, 29 Ohio St. 1, it is said in the syllabus:

"To defeat the title of an innocent purchaser to a note, on the ground of inadequacy of the price paid for it, the inadequacy must be such, under the circumstances, as to impeach the good faith of the purchase."

In the case of *Singree v. Welch*, 32 Ohio St. 320, it is said in the syllabus:

"A release of the wife's inchoate right of dower is a valid consideration for a conveyance of property to her.

"Such conveyance will not be held fraudulent and void as to the husband's creditors, unless the amount of consideration received is so disproportionate to the value of the wife's contingent dower as to be unreasonable.

"So great is the difficulty of estimating the worth of contingent dower rights, so uncertain and imaginary are the values which are the necessary elements of the computation, that the court will not pronounce the transaction fraudulent from the fact that the wife insisted upon and received a sum greater than her dower, if the facts do not show *mala fides* in her or her husband."

In the case of *Citizens Nat. Bank v. Wehrle*, 9 Circ. Dec. 330 (18 R. 535), it is said in the syllabus:

"To justify an inference of fraud from the inadequacy of the price alone, the consideration must be so clearly below the market value

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as to strike the understanding at once with the conviction that such a sale never could have been made in good faith."

And in the case of *Kerlin Bros. Co. v. Toledo*, 11 Circ. Dec. 56 (20 R. 603), paragraph 18 of the syllabus, it is said:

"There must be a clear abuse of corporate power upon the part of a legislative body to authorize a court to interfere. The administration of the affairs of the city is by the law entrusted to the council and officers of the city, and the council in matters of this kind is invested with a wide discretion, and so long as it keeps within its powers, its authority is supreme and not subject to the supervision or interference of the courts. To authorize a court to interfere upon the mere ground that the price is not sufficient, the price should be so much less than would probably be obtained by again offering the property, that it might be said by all men of fair judgment that the acceptance of the bid was a reckless and improvident act."

Let us then consider the testimony in view of the rule stated in these decisions. Perhaps the only definite testimony as to the reasonable value of constructing this sewer in tunnel work offered by the plaintiff is the testimony of Mr. Ford P. Beers who says that in his opinion such work complete was worth only \$50 per lineal foot. The price to be paid under the subsidiary agreement here in question was about \$60 a foot—to be accurate, I believe \$59.83. So that upon Mr. Beers' testimony the price is excessive to the extent of \$10 per lineal foot. It is quite evident, however, that Mr. Beers omitted from his estimate several items that ought to have been considered, for example he takes into account nothing for the hazards and dangers of performing this work under the conditions imposed by the contract and under the conditions as they existed where the work was to be done. He apparently does not take into consideration the uncertainty of the character of the soil that may be encountered in the progress of that work, nor the cost of machinery and appliances necessary to be provided for doing such work. He estimates a sufficient allowance of 2½ per cent upon the cost of the machinery allowing nothing for the wear and tear of machinery, nothing for the depreciation in value by reason of its use. Mr. Beers himself says that in performing the work of constructing the Edgewater Park sewer, which is practically all the work done in tunnel by him, the character of the soil therein varied and that the progress made depended upon the character of the soil and that sometimes they were able to make an advance of thirteen feet a day and on other days with the same equipment and the same force they were not able to go more than four feet a day. It is said that on one occasion prior to the time that this subsidiary agreement was entered into Mr. Beers said that he would do this work for \$50 a lineal foot and would enter into a contract to do the work on those terms, and to secure

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his offer he deposited a certified check for \$25,000 with the city treasurer. Undoubtedly this action on the part of Mr. Beers may be regarded as a very emphatic expression of his opinion that the work could be done for \$50 a foot, but it cannot be considered as having any legal effect. The deposit of a certified check for \$25,000 was not in pursuance of any provision of law whereby that was authorized to be done, and the terms upon which it were deposited were so indefinite that if the city undertook to specify in detail all the work, Mr. Beers might well have withdrawn his certified check and refused to enter into a contract or to make a bid. But suppose the city advertised for the work without any specification other than those named by Mr. Beers when he put the certified check, if he failed to bid, the city could not appropriate that check, its remedy, if it had one, would be solely an action against Mr. Beers for damages. So that the effect of that check so far as the city is concerned, was simply to limit the terms upon which bids would be asked and to give a very uncertain and contingent right of action to recover damages, if any damages were sustained.

In viewing the prices agreed to be paid to Wagner for this work, we cannot lose sight of the conditions as they existed. We cannot lose sight of the fact that there was an outstanding valid and subsisting contract between the city and Wagner for constructing a sewer in this section. This outstanding contract reserves no power to the city to terminate it at its pleasure and the testimony shows no default on the part of Wagner which would warrant the city to terminate it upon that ground.

Then there was this contract with the railroad company whereby the city assumed not only that it would do the work without injury to the railroad company's right of way or tracks and without interference with the operation of its railroad, but imposing the express obligation upon the city to pay all damages to person or property that might be caused by the construction of the work.

The city could have required Mr. Wagner to have put in nine-inch sheeting instead of two-inch sheeting, but, if it did so, it could not insist that he do it for the price paid for two-inch sheeting. If such a change was made then under the provisions of the contract the contractor would be entitled to receive from the city a fair and reasonable value of the increased cost and expense of putting in nine-inch sheeting instead of sheeting of the size originally specified, and it is shown here clearly that if nine-inch sheeting be used the cost of that work would be much greater than the cost under the subsidiary agreement, and it further appears from the testimony, I think, that the work done in open cut, even with nine-inch sheeting and under any conditions that might have been employed, would have been unsatisfactory, hazardous and dangerous. So that it is to the advantage of the city it seems to

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me to make the change from the construction in open cut to construction by tunnel work and that is a change which it could make only by agreement with the contractor. It is said that no written order was given by the city engineer to the contractor to put in nine-inch sheeting. That would be necessary before the actual work of putting it in could be commenced, but the city had fully determined that this work could not be done practically with two-inch sheeting and that if done in open cut it must be done with nine-inch sheeting.

In view of all the matters I have mentioned, the uncertainties of the cost of the work, the uncertainty as to the character of the soil that might be encountered, the conditions existing in connection with the railroad company and under the contract between the city and the railroad company, the fact that the city had this subsisting contract which it could not abrogate, looking at the cost of other work of a similar character which had been done, considering in short all the facts as they appear from the testimony and all the circumstances as they appeared to these parties at the time the subsidiary agreement was made, I am not prepared to say that this price was excessive, and much less am I prepared to say that the price was so excessive as to be evidence of fraud or bad faith.

Having thus reviewed the several grounds upon which this contract is attacked and on which the injunction is sought, and having found against the plaintiff upon all of these grounds, the judgment of the court will be, that the petition be dismissed, and the injunction will be refused.

CROSSINGS—HIGHWAYS—RAILROADS.

[Medina Common Pleas, December 17, 1906.]

L. O. BROWN ET AL. V. AKRON & CHICAGO. JCT. RY.

1. HIGHWAYS AT RAILROAD CROSSING MAY BE DIVERTED FROM COURSE.

When in the construction of a railroad it becomes necessary to cross a highway in the country, at such an angle as to render the building of a necessary bridge impracticable, the grade of the railroad being twenty-seven feet above the grade of the highway, the railroad company is granted, by Rev. Stat. 3284 (Lan. 5240), the right to divert the course of the highway. that a crossing may be made at a right angle, provided it does not impair the usefulness of said highway.

[For other cases in point, see 7 Cyc. Dig., "Railroads," §§ 335-341.—Ed.]

2. NECESSITY AND CONVENIENCE OF PUBLIC GOVERNS RIGHT TO DIVERT HIGHWAY.

The question of the necessity of the diversion of a highway for railroad purposes is for the court to decide, and in determining such question the convenience and necessity of the whole public, including travelers on the railroad as well as on the highway, should be considered.

[For other cases in point, see 7 Cyc. Dig., "Railroads," §§ 346-355.—Ed.]

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3. A DIVERSION OF A HIGHWAY MAY BE PERMANENT.

The diversion of a country highway which is authorized by Rev. Stat. 3284 (Lan. 5240), may be permanent, provided said diversion is reasonably necessary, and does not unreasonably interfere with the use of said highway by the public.

[Syllabus approved by the court.]

I. T. Siddall, N. H. McClure and F. W. Wood, for plaintiffs.

J. M. Lessick, Lee Elliott and Frank Heath, for defendants:

This provision of Rev. Stat. 3284 (Lan. 5240) forms part of the charter of the railroad company, and it has the effect of a contract between the state and the railroad company, in fixing the rights and liabilities of the company. *State v. Railway*, 36 Ohio St. 434; *Pittsburgh, Ft. W. & C. Ry. v. Maurer*, 21 Ohio St. 421; *Little Miami Ry. v. Greene Co. (Comrs.)* 31 Ohio St. 338; *Valley Ry. v. Bohm*, 34 Ohio St. 114; *Lorain Co. (Comrs.) v. Railway*, 12 Circ. Dec. 805; *Youngstown v. Railway*, 2 Circ. Dec. 121 (3 R. 214); *Cincinnati, N. Ry. v. Cincinnati*, 8 Dec. Re. 554 (8 Bull. 334).

It will be observed that the following cases were cases where the railroad company had, without authority of any kind, permanently obstructed and was exclusively using a fixed portion of a public highway, as it was then located, without any pretense of having diverted it, and were in no wise like the case at bar where the highway is no longer on its old location, but has been diverted by the railroad company under the power given it by Rev. Stat. 3284 (Lan. 5240). *State v. Railway*, 36 Ohio St. 434; *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738]; *Little Miami Ry. v. Greene Co. (Comrs.)* 31 Ohio St. 338; *Youngstown v. Railway*, 2 Circ. Dec. 121 (3 R. 214).

This defendant does not now, and never did, claim that it has any right to permanently obstruct and exclusively use any portion of these public roads, either with or without the consent of any public official, for no public officials could grant such a right if they would. *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738].

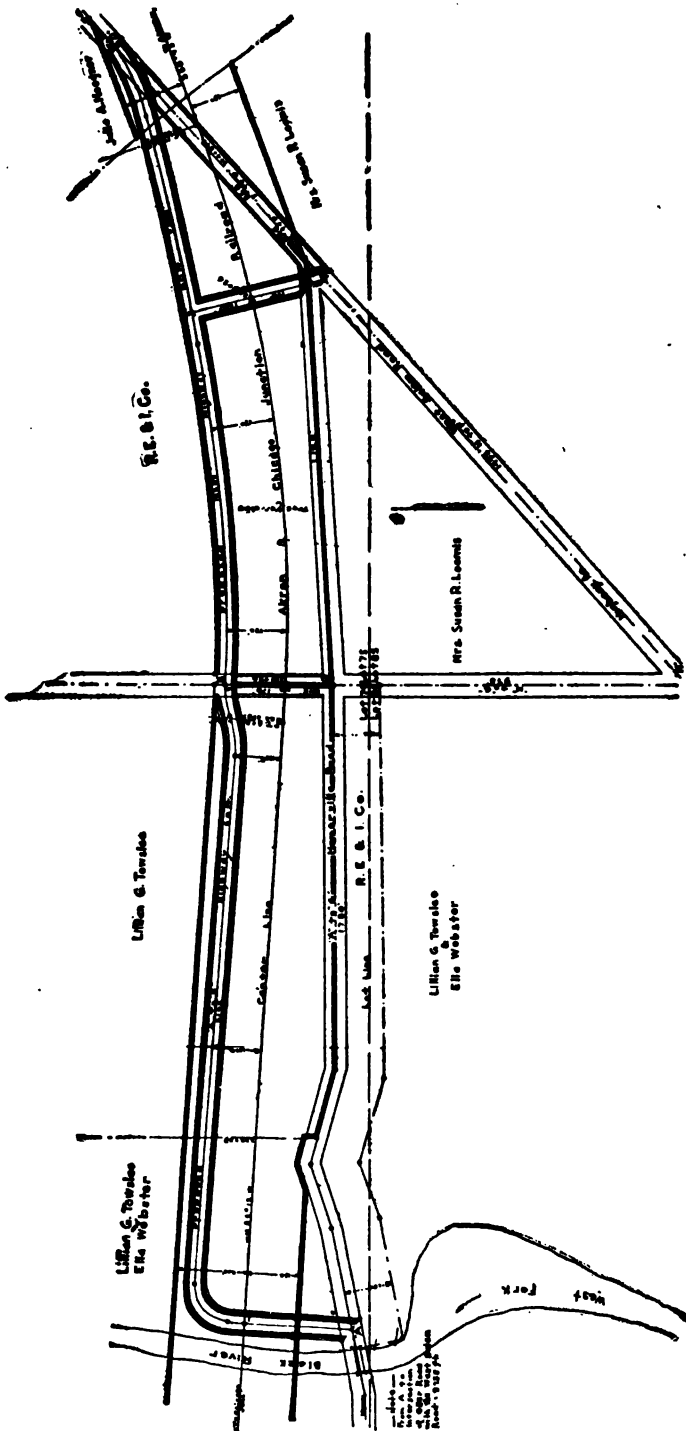
WASHBURN, J.

The defendant [in *L. O. Brown et al., commissioners of Medina county, v. Akron & Chicago Junction Railroad Company*] is engaged in the reconstruction of its road in Medina county, for the purpose of avoiding dangerous grades and curves, and in Harrisville township it is practically building a new road*—the location of the present road being a long distance from the old road and the difference in the grade being more than twenty-five feet.

In constructing its road upon the new line, it crosses a highway known as the Lodi and West Salem road, which is a diagonal road extending from Lodi southwest to West Salem and beyond. This high-

*[See map on next page.—Ed.]

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way is a main highway, much traveled. The railroad crosses it a little over a mile southwest of Lodi, at an angle of about twenty-one degrees, and the grade of the railroad is at least twenty-seven feet above the grade of the highway at the point of crossing. West of the point of crossing this highway, a distance of about one thousand five hundred feet, the railroad crosses at right angles a north and south highway, known as the Chatham road, which road intersects the Homerville road just south of the railroad, and ends in the before-mentioned diagonal road about a thousand feet south of the railroad. The Chatham road is a very little used highway, especially for travel, south from the point where the railroad crosses it. About two thousand feet west of where the railroad crosses the Chatham road the railroad company is building a stone arch bridge, and is proposing to connect the east and west Homerville road through under this bridge to a new east and west road just north of the railroad, and parallel thereto, which it proposes to lay out and construct eastward across said Chatham road and to said diagonal road.

Then the railroad company is proposing to divert said diagonal road at the point of the crossing of the railroad to the westward about five hundred feet and thence south, crossing the railroad, at right angles under a stone arch bridge and connecting again with the diagonal road.

And the railroad company is proposing to fill up the Chatham road where it crosses the same with an embankment about forty feet high.

The plaintiffs, claiming that these diversions of the highways were not authorized by law, brought this action to enjoin the railroad company from making them and from diverting or obstructing said diagonal road and said Chatham road at the points of crossing.

A temporary injunction was granted, and the case is now submitted to the court for final disposition.

I never tried a case in which the law which the plaintiff claims should govern the case differed so widely from the law which the defendant claims should govern the case.

The defendant is proceeding to divert the highways in question under the provisions of Rev. Stat. 3284 (Lan. 5240), which reads:

"A company may, whenever it is necessary, in the construction of its road, to cross a road or a stream of water, divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness."

It has been held that this section applies only to country roads and not to the crossing of streets or highways in municipal corporations. *Youngstown v. Railway*, 2 C. D. 121 (3 R. 214); *Cincinnati No. Ry. v. Cincinnati*, 8 Dec. Re. 554 (8 Bull. 334).

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The plaintiff claims that a railroad company cannot legally acquire one inch of a public highway so as to occupy it to the exclusion of the public, unless the same is acquired by proceedings for the vacation of highways in accordance with the law providing for the vacation of highways. And it is not claimed that any such proceedings were had in this case.

On the other hand, the defendant claims that the statute above quoted gives it the right to divert a highway in the country without asking permission of the township trustees, county commissioners or anyone else, and that the railroad company is itself the judge of whether or not it is necessary to divert the highways in question.

In other words, that the railroad company has the absolute right, under that statute, to divert the highways in question, provided it restores them to their former state of usefulness, and that in a proceeding like this the court even cannot determine that there is no necessity for the diversion, and enjoin the same.

The court cannot agree with the law as above claimed by either party to this action.

If the plaintiff's claim is correct,—that is, that the location of a highway cannot be changed, except by vacating the part changed,—then Rev. Stat. 3284 (Lan. 5240) as above quoted is entirely superfluous; because if the railroad company proceeded as the plaintiff claims it must proceed, under the vacation statute, it could acquire the absolute title in fee simple to the parts of the highway diverted, without the aid of Rev. Stat. 3284 (Lan. 5240). *Megrue v. Putnam Co. (Comrs.)* 8 Circ. Dec. 262 (15 R. 242), is a case in which Judge Price, then a circuit judge, participated, and it was there held that Rev. Stat. 3283, 3284 (Lan. 5239, 5240) gave authority to the county commissioners to contract with a railroad company for a surrender to the railroad company for its exclusive use of a portion of a public highway, provided the railroad company diverted the highway and restored the same to its former state of usefulness by substituting another way for the part taken by the railroad company. There was no vacation of the highway under the statute in this case and there was an exclusive use granted, but it was authorized because there was a diversion and the substitution of another way.

In other words, while the authorities could not give away or sell a part of the highway, they could exchange a part of it for another way.

I am aware that there are numerous cases in Ohio which hold that the public highways of the state are sacred, and that neither the commissioners nor the township trustees nor the council of cities have any authority to make an agreement with a railroad company by which the company shall acquire the right to use any part of the public highway to the exclusion of the public, without substituting another way for the part used by the railroad.

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That is the well-settled law in Ohio, and it is stated in very strong language by the Supreme Court in the case of *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738], and *Wabash Ry. v. Defiance*, 52 Ohio St. 262 [40 N. E. Rep. 89].

But a careful reading of these cases and of all the cases cited by counsel, discloses the fact that a part of the highway was being taken without substituting any other way therefor, and under the laws of Ohio, such a result, that is, the taking of a part of the highway without substituting another way therefor, can be accomplished only by proceedings under the statute for the vacation of highways.

In other words, the public highways cannot, by agreement of the parties or otherwise, be obstructed; but must be kept open and in repair and for the use of the public.

But the case at bar is not a case where the railroad company is seeking to take a part of the highway without substituting any other way therefor.

The railroad company does not claim that it has a right to obstruct the highway or to take a part of the highway and use it to the exclusion of the public, except on condition that it restore the highway to its former state of usefulness by substituting another highway therefor. And if it does restore the highway to its former state of usefulness by substituting another way, then it does not obstruct the highway, nor does it exclude the public from the highway.

Revised Statute 3283 (Lan. 5239) gives to certain public authorities, having charge of streets and highways, authority to agree, under certain circumstances, that a railroad company may use a street or highway or a part thereof in the construction of its railroad, and on failure to so agree, the railroad company is empowered to acquire such right by appropriation proceedings; but it is settled that the right so acquired by agreement, or appropriation, is only that of joint occupancy, and said section does not provide a way whereby the railroad can acquire the exclusive occupancy and use of the street or highway, without substituting another way therefor. *Zanesville v. Fannan*, 53 O. S. 605, 614 [42 N. E. Rep. 703; 53 Am. St. Rep. 664]; *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738].

Under Rev. Stat. 3283 (Lan. 5239) a railroad cannot acquire by appropriation the right to the exclusive use of a highway; neither can it, under this section, acquire such right by agreement with the public authorities, except by substituting another way for the one taken. If the public authorities arbitrarily and without good cause refuse to agree to a reasonable substitution of another way, and the people in the vicinity arbitrarily and because of an unreasonable hostility prevent a vacation of the highway, then, if there is no other way provided by law by which the railroad company can acquire that which is reasonably

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necessary in the construction of its railroad, it would be very difficult—almost impossible—to build railroads in Ohio.

Roads are public necessities and are so recognized by the law. When they are conducted for private gain, they have a public character and laws have been passed, regulating and controlling them as public agencies, and the rights which their public character entitles them to must be considered as well as the convenience of those traveling on the highway in the country.

The legislature must have intended to provide some way by which those having charge of a country road in a township and the people living in that immediate vicinity, could not obstruct a great public improvement and prevent the building of the railroad by arbitrary and unreasonable opposition, and my judgment is, that Rev. Stat. 3284 (Lan. 5240), when construed with the other sections of the statutes and the decisions of the Supreme Court, can be and should be so construed as to have some force and effect, and that it does provide a way by which a railroad company, when it is prevented by arbitrary and unreasonable opposition from acquiring the right to the exclusive use of a part of a highway in the country, by appropriation proceedings or agreement under Rev. Stat. 3283 (Lan. 5239) or by having the same vacated, may acquire that right by diverting the highway and substituting another way therefor, provided such use be reasonably necessary and the substituted way is a substantial restoration of the highway to its former state of usefulness.

On the other hand, the claim of the defendant that it is the judge of whether or not a diversion of the highway is necessary, and that it may divert a highway in the country at will, subject only to the restriction that it restore the same to its former state of usefulness, ought not to be the law in my judgment, for if it was, a railroad company building across a county, might divert all the highways of that county simply and solely for the reason that it would be some convenience to the railroad company in building its railroad, and without reference to the convenience or wishes of the people of the county.

It is well settled that a grant such as is contained in Rev. Stat. 3284 (Lan. 5240) should be strictly construed against the railroad company, and I do not think that the legislature intended to vest in railroad companies the absolute right to divert highways at will, even if the railroad companies can and do restore the diverted highways to their former state of usefulness.

After listening to the very able and extended arguments of counsel in this case, and after looking over the various authorities cited by them, I have come to the conclusion that a proper construction of Rev. Stat. 3284 (Lan. 5240) is this:

That when, in the construction of a railroad, it becomes necessary

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to cross a highway, in the country, the railroad company is granted by this section the right to divert such highway, provided:

First. That the proposed diversion is reasonably necessary, and

Second. That the railroad company restores the highway to its former state of usefulness.

The railroad company may, in the first instance, determine whether or not it is necessary to divert the highway; if that claimed necessity be questioned in court, then it is a question for the court to decide whether or not the proposed diversion is reasonably necessary.

In considering whether or not the diversion is necessary, the court should consider the conveniences and necessities of the whole public, the railroad being a part of the public; the rights of the public traveling along the railroad are to be considered as well as the rights of the public traveling on the highway.

Among other things, the court should take into consideration the location and use of the highway; the location, character and use of the railroad; the necessities of the public, not only in the use of the highway, but in the use of the railroad; the feasibility and practicability of building the railroad without diverting the highway, and the expense that would be made necessary to do that; the grades of the railroad and the highway, and all of the facts and circumstances of the situation as shown by the evidence.

If the court determines that the diversion is necessary, then the next question is, Can and will the railroad company restore the highway to its former state of usefulness?

And in determining whether or not the highway can be restored to its former state of usefulness, it goes without saying, that this does not mean that it must be restored to its former location, because if that was the case there would be no sense in saying it could be diverted.

Besides a very large number of cases have been cited by counsel which hold that the railroad company need not restore the highway to its former location, and as I remember it, none have been cited which hold that it must restore the highway to its former location.

If the diversion is permanent, then of course there is no restoration of the highway in its former location, and the Supreme Court of this state has decided that the diversion may be permanent, and that authority is given a railroad company to condemn property necessary to substitute another highway for the one taken. The language of the Supreme Court decision in *Valley Ry. v. Bohm*, 34 Ohio St. 114, 119, is as follows:

"This provision confers power to divert the road or stream, coupled with the duty imposed to place the same, after diversion, in such condition as not to impair its previous usefulness. The requirement is not to restore to its former place or condition, but to such condition as not to affect, materially, its utility. It is to be left in such condition, how

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much soever it may be diverted from its former course, that the right to its public or private enjoyment, where such right exists, shall not be materially disturbed or interfered with. * * * Subject to the performance of this condition, the power or right to divert the same is coextensive with the public necessity which calls for its exercise. The meaning assigned to the language of this section, by counsel for the defendant, confines the right to divert the stream or highway, to a use merely temporary in its character. This we think far too restricted; so much so, that, if adopted, it, to a greater or less extent, would result in defeating the obvious design of the statute. The diversion may be temporary or permanent, as the public needs or necessities require."

In *Potter v. Bunnell*, 20 Ohio St. 150, which was a case where the diversion was a permanent one, the language of the decision beginning at page 161 is:

"The company was empowered by its charter to divert highways whenever it was necessary 'in the construction' of its road; but they were also required to place such highway, without unnecessary delay, 'in such condition as not to impair its former usefulness.'"

And further on this subject, Judge Boynton, speaking for the Supreme Court in *Little Miami Ry. v. Greene Co. (Comrs.)* 31 Ohio St. 338, 347, says:

"There is little doubt that the legislature did not intend to require a railroad company in crossing a public highway to restore the same to its actual former condition. This would be practically impossible. Substantial restoration is all that was contemplated or intended. Some inconveniences to public travel are necessarily incident to all public railroad crossings, and such as are inseparately connected therewith, must be submitted to by the public."

So that my conclusion is, that if the court finds, considering all the facts and circumstances, that the proposed diversion of the highways in question is necessary, and that the railroad company can and will make a substantial restoration of the highway, by diverting the same and substituting another way therefor, then the proposed diversion is authorized by law. This being the law, what solution does it lead us to when applied to the facts and circumstances of this case?

First. As to the diagonal road or the road known as the Lodi and West Salem road: At the point of crossing this highway, the highway is more than sixty feet wide; the railroad crosses it at a very acute angle, and the testimony satisfies the court that it is very difficult and very expensive to construct a bridge across the highway at that angle, and that it would not be good railroad construction to do so, and considering the character of the railroad being built by the defendant company and the cost and difficulties of constructing such a bridge as would be necessary at such an angle, the court feels fully satisfied

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that it would be unjust to require the railroad company to bridge the highway as it is now located, but that some diversion of the highway so as to permit a crossing at right angles is necessary.

I find, however, that it is not necessary to divert the highway to the westward as far as is proposed by the railroad company; but that a reasonable diversion would be to divert it so far and no more than is necessary to cross the railroad at right angles. That can be done without materially lengthening the highway, without changing its grade and with but slight inconvenience to the public, except that the view would be obstructed, and that in my judgment is one of the inconveniences to public travel that is necessarily incident to such crossings, and is insignificant when compared with the expense and difficulty of building such a bridge as would be required at that point if no diversion was permitted.

I, therefore, find in reference to this highway, that if the railroad company divert it as I have indicted, and drain, gravel and macadam it as is proposed by them, and in addition to that, will build the kind of a bridge that is proposed to be built by them—that is, a stone arch bridge over the whole width of the highway at right angles—and will construct the same so that a street car track may be laid on their right of way through and under one of the arches to said bridge off of the highway, so that when a street car company is granted the right to use said highway for street railway purposes, it may build its track through said arch and thus avoid inconvenience and danger to the public at the point of crossing the railroad. If these things be done, my judgment is, that there will be a substantial restoration of the highway to its former state of usefulness.

Having heretofore found that it is necessary to divert this highway and having indicated what the court considers would be a substantial restoration of the highway to its former state of usefulness, I find that the highway may be diverted, provided the railroad company does what I have indicated.

As to the crossing of the Chatham road, I find from the evidence that the Chatham road is a very little used highway, especially for travel toward West Salem; that it ends to the south within about a thousand feet of this railroad by running into and connecting with said diagonal road, known as the Lodi and West Salem road; that if the railroad company divert the same as proposed, by building along the north line of their track a highway, properly drained, graveled and macadamed, connecting said Chatham road to the east with said diagonal road, and on the west through the arch bridge over Black river with the Homerville road, such a diversion will be of very little inconvenience to the public travel; but on the contrary will be a benefit to the most of the travel on the Chatham road. The public using the Chatham road north of the

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railroad could then have equally as good facilities for using the Homer-ville road as they now have, and they would have much better facilities for using the diagonal road in driving to Lodi, and the only inconvenience would be to those desiring to go toward West Salem, and that inconvenience would cause them to travel two sides of a triangle about fifteen or eighteen hundred feet in length instead of one side of that triangle, and the travel in that vicinity as shown by the evidence toward West Salem is very light, and in all human probabilities will remain so.

There would be, however, an additional burden placed on the people to maintain and keep in repair a somewhat greater length of highway.

So that I feel that if the Chatham road is diverted by the railroad company as proposed, and the defendant will pay to the proper authorities having charge of the keeping and repair of said road the sum of \$5,000, to be used by said authorities in keeping said roads in repair in the future, said Chatham road will, all things being considered, be restored to substantially its former state of usefulness.

But, I have had some trouble in determining whether or not there is such a necessity for the diversion of the Chatham road as justifies the court in permitting its diversion.

The Chatham road as it now crosses the railroad is at right angles, and the only necessity for the diversion, is the fact that it would save the railroad company the expense of building a bridge over the entire highway at an expense of at least \$50,000. The expense of building the railroad without diverting the highway is proper to be considered in determining the necessity of the diversion, and there may be circumstances where the inconvenience to the public traveling on the highway by the diversion, is so slight, and the expense of building the railroad without diverting the highway so great, that a court of equity ought to determine that the great expense alone is sufficient necessity for the diversion.

Suppose for instance, that a railroad crosses two highways within one hundred feet, and that one highway can be turned into the other for a short distance without materially affecting or inconveniencing travel on the highway, but in fact benefiting the bulk of the travel on the highway, and suppose the cost of the extra bridge to be \$100,000, would any reasonable man claim that the \$100,000 expense of an extra bridge within one hundred feet of another bridge was not a sufficient necessity for the slight diversion?

The present case as to the Chatham road is like the one above suggested, except as to the extent of the diversion and the cost of the bridge.

But, as the railroad company must build such a bridge across said diagonal road about fifteen or eighteen hundred feet eastward from the Chatham road, and as the railroad company is building a similar bridge

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about two thousand feet to the westward, near Black river, and as I find that the Chatham road as it is proposed to be diverted is a substantial restoration of it to its former state of usefulness, my best judgment—although I am in some doubt about the matter—leads me to the conclusion that, considering the slight inconvenience the public will be put to by such diversion, and the expense that the railroad company would be put to in building a third bridge of this character within less than a mile, there is a sufficient necessity shown to justify the court in granting the permission to divert, upon the conditions and as I have indicated.

See *Lorain Co. (Comrs.) v. Railway*, 12 Circ. Dec. 805, where a greater diversion was permitted in Lorain county by our circuit court.

The court having found that the diversion of these highways as proposed by the railroad is not a proper diversion in all respects, the order will be, that the defendant pay the costs of these proceedings; if the railroad company will not make the diversions upon the conditions and in the manner I have indicated, then a decree may be entered, enjoining said company from diverting said highways as it is now proposing to do; but if the railroad company will adopt the suggestions of the court as to the diversion of these highways, and make it appear to the court that it proposes to and will divert the highways upon the conditions and as I have indicated, then the injunction in this case will be dissolved and the petition of the plaintiffs dismissed. That will permit a taking of the case to the circuit court by the plaintiffs.

But, should the plaintiffs not desire to take the case higher, the court will make an order dissolving the injunction and continuing the case, with the understanding that if the railroad company does divert these highways as above indicated, and to the full satisfaction of the court, then the case will be dismissed, but if it does not do so, then the railroad company will be required to restore said highways to their present location and condition. *State v. Railway*, 36 Ohio St. 434.

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DOWER—MORTGAGES—PARTITION.

[Darke Common Pleas, March 6, 1904.]

*FLEMING, EXR. v. MORNINGSTAR.

PRIORITY OF DOWER OVER MORTGAGE TO SECURE OWELTY.

In a case of amicable partition between two heirs, by mutual conveyances of unequal purparts, in which conveyance the wife of one of the heirs joins, a mortgage given by such heir to the other, to equalize the allotment in which his wife does not join, is subordinate to the wife's inchoate right of dower in the undivided interest acquired by descent by such mortgagor in the purpart so allotted to him, but is superior to dower in the share acquired by purchase from the mortgagee.

[For other cases in point, see 6 Cyc. Dig., "Partition," §§ 148-155.—Ed.]

[Syllabus approved by the court.]

Robison & Yount and D. P. Irwin, for plaintiff.

Anderson, Bowman & Anderson, for defendant:

Dower is favored. *Dunseth v. Bank*, 6 Ohio 76; *Coke's Littleton* 125a; *Kennedy v. Nedron*, 1 U. S. (1 Dall.) 415 [1 L. Ed. 202]; *Betts v. Wise*, 11 Ohio 219; *Mandel v. McClave*, 46 Ohio St. 407 [22 N. E. Rep. 290; 5 L. R. A. 519; 15 Am. St. Rep. 627]; *Banks v. Sutton*, 2 P. Wms. 702; *Noel v. Ewing*, 9 Ind. 37; *Lasher v. Lasher*, 13 Barb. 106; *Meigs v. Dimock*, 6 Conn. 458; *Tate v. Jay*, 31 Ark. 576; *Chew v. Chew*, 1 Md. 163; *Scribner*, Dower Chap. 1, Sec. 33.

Widow's dower attached when husband acquires title. *Greene v. Greene*, 1 Ohio 535 [13 Am. Dec. 642]; *Sumner v. Hampson*, 8 Ohio 328 [32 Am. Dec. 722]; *Mandel v. McClave*, 46 Ohio St. 407 [22 N. E. Rep. 290; 5 L. R. A. 519; 15 Am. St. Rep. 627].

Acquisition of title and purchase money mortgage must constitute one act. 10 Am. & Eng. Enc. Law (2 ed.) 137; 1 Jones, Mortgages Sec. 568; *Holbrook v. Finney*, 4 Mass. 566 [3 Am. Dec. 243]; *Nash v. Preston*, Cro. Car. 190; *Smith v. McCarty*, 119 Mass. 519; *Thomas v. Hanson*, 44 Iowa 651; *Young v. McKee*, 13 Mich. 552; *McClure v. Harris*, 51 Ky. (12 Mon. B.) 261; *Clark v. Brown*, 85 Mass. (3 Allen) 509; *Mayburry v. Brien*, 40 U. S. (15 Pet.) 21 [10 L. Ed. 646]; *Clark v. Munroe*, 14 Mass. 351; *Stow v. Tift*, 15 Johns. 458; *McCauley v. Grimes*, 2 Gill & J. 318 [20 Am. Dec. 434]; *Kittle v. Van Dyck*, 1 Sanf. Ch. 76; *Moore v. Rollins*, 45 Me. 493; *Pendleton v. Pomeroy*, 86 Mass. (4 Allen) 510; *Nottingham v. Calvert*, 1 Carter (Ind.) 527; 4 Kent's Commentaries 39; *Park*, Dower 43; *Welch v. Buckins*, 9 Ohio St. 331; *Elliott v. Plattor*, 43 Ohio St. 198 [1 N. E. Rep. 222]; *Ruffner v. Evans*, 1 Circ. Dec. 368 (2 R. 70).

The mortgage must originate in the purchase of land. 1 *Scribner*, Dower Sec. 278.

*Affirmed, circuit court, without report; *Fleming v. Morningstar*, 72 Ohio St. 647.

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Her dower not defeated by owelty of partition. *Pomeroy*, Eq. Jurisp. Sec. 1389; 1 Story, Eq. Jurisp. Sec. 654; *Earl of Clarendon v. Hornby*, 1 P. Wm. Chan. 447; *Smith v. Smith*, 10 Paige Ch. 470; *Cox v. McMullin*, 55 Va. (14 Gratt.) 82; *Darlington's Appropriation*, 13 Pa. St. 430; *Reed v. Trust & Safe Dep. Co.* 113 Pa. St. 574 [6 Atl. Rep. 163]; *Wood v. Little*, 35 Me. 107; *King v. Reed*, 77 Mass. (11 Gray) 490; *Wrenn v. Gibson*, 90 Ky. 189 [13 S. W. Rep. 766]; *Wilson v. Railway*, 62 Me. 112; *Applegate v. Edwards*, 45 Ind. 329; *Norman v. Harrington*, 62 Ala. 107; *Weaver v. Gregg*, 6 Ohio St. 547 [67 Am. Dec. 355]; *Gillett v. Miller*, 5 Circ. Dec. 588 (12 R. 209); *Smith v. Rothschild*, 2 Circ. Dec. 698 (4 R. 544); *Docktermann v. Elder*, 11 Dec. Re. 506 (27 Bull. 195); *Totten v. Stuyvestant*, 3 Edw. Ch. 500; *Freeman, Cotenancy & Partition* Sec. 411; *Mosher v. Mosher*, 32 Me. 412; *Thomas v. Bank*, 32 Md. 57; *Horde v. Landrum*, 5 S. C. 213; 11 Am. & Eng. Enc. Law (2 ed.) 118; *Greene v. Greene*, 1 Ohio 535 [13 Am. Dec. 642].

ALLREAD, J.

The controverted question here is the claim of Mrs. J. H. Morningstar to dower in a fourteen-acre tract of land sold by the administrator as part of the estate of her late husband.

This tract with others constituted the W. H. Morningstar estate, which upon his death in 1886, descended to J. H. and Alice Morningstar (now Fleming) in equal moieties.

There was a mortgage upon certain of the tracts given by the ancestor, and which is known in this case as the "Walker" mortgage. J. H. and Alice Morningstar gave a mortgage also upon certain of the tracts, known as the "Bachman" mortgage. The fourteen-acre tract was not included in either mortgage.

On July 1, 1889, for the purpose of amicable partition, the tenants in common agreed upon a division of the several tracts of the W. H. Morningstar estate, and each tenant in common released by a quitclaim deed the undivided half of the tracts allotted in severalty to the other. The allotment to J. H. Morningstar was valued at \$6,300; this included the fourteen-acre tract valued at \$2,100. The allotment to Alice was valued at \$3,200. This would leave a balance upon allotment due her of \$1,550.

Alice assumed the "Walker" mortgage of \$1,128.65 and J. H. assumed the "Bachman" mortgage of \$1,539.75. The difference in the amount of the mortgages assumed was in favor of J. H., \$205.50, reducing the actual purchase money due Alice on the exchange to \$1,344.50.

In their settlement, however, the purchase money of the tracts was mingled with other items and there was found due Alice by settlement, after deducting the excess of the mortgage assumed by J. H., \$1,866.40.

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On the date of the partition deeds, a mortgage was given by J. H. to Alice Morningstar on the fourteen-acre tract for \$1,500, reciting it to be for purchase money. No very clear evidence is forthcoming as to the discrepancy between \$1,866.40 and \$1,500, the amount of the mortgage, but an inference arises that this amount was settled either by mutual accounts not shown or by cash payment.

The partition deed to Alice was signed by the wife of J. H., releasing dower, but she did not join in the mortgage. The \$1,500 mortgage is now asserted by Alice and claimed to be superior to the dower of Mrs. Morningstar, and to be in fact a purchase-money mortgage upon the entire interest in the fourteen-acre tract.

Counsel do not differ materially as to the principle governing a vendor's lien, but the difficulty arises in applying the principle to a case of amicable partition. As to the property sold, the equity of the vendor attaches at the very instant of the conveyance and is, therefore, superior to the dower. And the controversy here arises out of the character and nature of the dower interest, attaching it to the estate of the tenant in common, as affected by the partition.

There is a clear distinction between estates in joint tenancy as existing at the common law and estates in common. In the former the estate of all the joint tenants was regarded as one estate and no dower attached, but in case of tenancy in common each cotenant had a separate freehold estate and inchoate dower in the latter case attached to the undivided interest immediately upon seizin of the husband. But such right of dower was subject to the right of partition by the cotenants.

Tracing the legal title alone, it would appear that J. H. Morningstar acquired one undivided half of this fourteen-acre tract by descent and one undivided half by purchase from Alice, the former having been acquired in 1886 and the latter in 1889.

It is claimed that a different principle applies in case of partition and that the difference in the value of the shares taken in severalty is a prior lien upon the larger purpart.

Partition may be either by judicial or voluntary proceedings. If by judicial proceedings the dowress is bound by the partition and her right attaches to the land apparted, or if the land cannot be apparted, and is sold, the dower is divested and her right, if any, is transferred to the fund. *Weaver v. Gregg*, 6 Ohio St. 547 [67 Am. Dec. 355]; *Gillett v. Miller*, 5 Circ. Dec. 588 (12 R. 209).

In case of voluntary partition where equal shares are set off to the parceners the weight of authority is to the effect that the right of dower upon the cotenant's share is remitted to the allotment in severalty. *Carter v. Day*, 59 Ohio St. 96, 101 [51 N. E. Rep. 967; 69 Am. St. Rep. 953]; First Scribner, Dower, Sec. 341; *Docktermann v. Elder*, 11 Dec. Re. 506 (27 Bull. 195).

It is claimed with much force and supported by a carefully and

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well-prepared brief and argument that the same effect must be given to an amicable partition as to a judicial proceeding, and if dower is divested in the latter no less effect should be given to deeds of partition, especially as against the amount necessary to equalize the shares.

Dower is a statutory right. The statutes which give dower also divest it in certain contingencies. *Weaver v. Gregg, supra*.

No statute expressly divests dower on amicable partition, and hence such contention must find support in other authority.

It is argued that the difference in value between the larger and smaller purparts or divisions is a lien on the larger on the principle of owelty of partition, a doctrine originating in the chancery practice in England, and now recognized by statutes in many states. This doctrine is applied where it is impossible or impracticable to divide the estate in equal shares, and unequal allotments are therefore made subject to a charge upon the greater. Owelty of partition does not exist in this state as a statutory right. Where equal shares cannot be allotted, the entire estate is required to be sold and the proceeds distributed. But even if recognized in a case where the unequal division is made by consent, it yet remains to be considered what the effect of such a division has upon the inchoate dower of the wife of the tenant in common.

Owelty of partition where it exists is in the nature of a vendor's lien; but is it superior to dower?

The case of *Mosher v. Mosher*, 32 Me. 412, supports the view that the inchoate dower attaching to the interest of the cotenant acquired by descent is not affected by such lien. See also 11 Am. & Eng. Enc. Law (2 ed.) 118; *Horde v. Landrum*, 5 S. C. 213.

In *Thomas v. Bank*, 32 Md. 57, 58, the real estate descended to four children and by agreement was divided among three with a charge in favor of the fourth for her share. One of the three became involved and assigned without having paid the amount charged. It was held that the lien for such charge arising in the division of the estate rested only on the one-fourth interest acquired by purchase from the heir in whose favor the lien was claimed and not upon the three-fourth interest acquired in part by descent and in part by purchase from the other heirs.

Freeman, Cotenancy & Partition Sec. 411, in reference to the rights of the wife of a cotenant, says:

"By confining them to the equal shares which their husbands take in the partition they have all the dower the law gives them; a voluntary partition is allowed to operate upon inchoate rights of dower because these rights are not thereby destroyed or impaired, but affected in substantially the same manner that the estates of the husband are affected, and an undivided interest in the whole property becomes a several interest in a specified parcel."

The author then takes up the case where a husband exercises the

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right of partition to defeat the wife's dower or defraud her, and says in such case the reason ceases, adding:

"Hence if he makes partition taking the smaller or less valuable property, receiving his compensation for so doing, the wife's right to have dower assigned at his death will not be restricted to the lesser party."

In *Carter v. Day*, *supra*, Williams, J., discussing the principle upon which the authorities maintain that a partition of land creates no new title to the shares set off in severalty, confines the doctrine to cases where each cotenant receives no more than his proper share of the land.

In *Freeman v. Allen*, 17 Ohio St. 527, where a tenant in partition took the whole estate by election, it was held that his estate was ancestral as to the interest acquired by descent, but as to the remainder acquired by election it was considered an estate by purchase.

It also argued that Mrs. Morningstar, the dower claimant, having joined in the partition deed to Alice, releasing her dower in her husband's interest in that tract, she consented to the partition and thereby became endowed with a larger amount of real estate and ought not now to be permitted to assert dower as against the mortgage given for the excess of the share taken by her husband.

If authority is sought on this subject it can only be supported as an exchange of mutual interests which at common law puts the widow to an election between the tracts exchanged. 2 Blackstone's Commentaries 323.

In order, however, to sustain a case of exchange the interests mutually transferred must be equal. Otherwise the right of dower will attach as in ordinary cases of sale and conveyance. 1 Scribner, Dower 288; *Wilcox v. Randall*, 7 Barb. 633.

Even if the doctrine of exchange applies, it would put the dowress to an election between dower in the interest conveyed by the husband and that received by the husband in the exchange, which is, in this case, the undivided interest of the husband acquired by purchase, and such doctrine would not affect the dower attaching to the interest of the husband which he had acquired by descent.

Upon a full and extended consideration the court has arrived at the conclusion that J. H. Morningstar, after the division of the estate, held title to the fourteen-acre tract, one-half by descent from his father and one-half by purchase from Alice. That the mortgage of Alice attached as a purchasing money mortgage as the first lien upon the interest acquired by purchase, but subject to the dower upon the undivided half acquired by descent.

The dower will be computed according to the usual tables and made the first lien on the undivided half so acquired by descent. As to the other undivided half, the dower will be fixed at the same amount but made subject to the purchase-money mortgage.

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INTERROGATORIES—PLEADING.

[Ashtabula Common Pleas, January 17, 1907.]

R. A. RUSSELL, ADMR. v. LAKE SHORE & M. S. RY.

1. INTERROGATORIES, WHEN NOT PROPERLY ANNEXED TO PLEADINGS.

Right to annex interrogatories provided for by Rev. Stat. 5099 (Lan. 8614) does not extend to questions attached to an answer in an action by an administrator for the wrongful death of the decedent nor when the information asked for is necessarily not within the personal knowledge of the party to whom addressed nor when not pertinent to pleading to which attached nor when a responsive answer would be mere opinion and not fact. In such cases a motion to strike off the interrogatories should be sustained.

2. DOES GENERAL ALLEGATION OF CONTRIBUTORY NEGLIGENCE AFFORD AFFIRMATIVE DEFENSE.

Query, whether a general allegation in the answer of contributory negligence gives to the defendant a right of affirmative defense on that ground. [For other cases in point, see 6 Cyc. Dig., "Pleadings," §§ 1358-1373.—Ed.] [Syllabus by the court.]

MOTION to strike off interrogatories attached to answer.

A. C. White and E. J. Pinney, for plaintiff.

Hoyt, Munsell & Hall, for defendant.

ROBERTS, J.

The plaintiff alleges in the petition, as the administrator of the estate of Hattie A. Wilcox, deceased, that on July 25, 1906, the defendant, by its employes, was running a train southerly on its railroad track, approaching a public crossing in Williamsfield township, at the same time that the decedent was driving northerly upon the highway approaching said crossing; that while the plaintiff's decedent was in the exercise of all due care, the defendant so negligently and carelessly ran its said train, without sounding any whistle or ringing any bell for said crossing, and at such an unlawful and negligent rate of speed that it ran said train in, upon and against the carriage in which the decedent was riding, whereby she was instantly killed. This action is brought for the benefit of the two children of said decedent.

The defendant has filed an answer to the petition, in which it admits the representative capacity of the plaintiff; that it is a corporation; the location of said crossing; that on said day one of the trains of the defendant running southerly on said railroad track struck the vehicle of said decedent and that she was so injured that she died from the effects of said injury, and that she left surviving her the children named in the petition. The answer denies each and every other allegation contained in the petition.

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To the answer the defendant has attached certain interrogatories, which the plaintiff is asked to answer. Which interrogatories are as follows:

"1. What acts of care did the plaintiff's decedent exercise in approaching the Stanhope crossing at the time of the accident complained of in the petition?

"2. Did the horse driven by said decedent approach said crossing at the time of the accident on a walk, trot or run, or otherwise?

"3. Did said decedent look and listen for approaching trains before driving upon said crossing?

"4. Did said decedent have full control of her horse at and just previous to driving upon the crossing at the time of the accident?

"5. At what speed was the train running at the time of the accident complained of?

"6. What did the unlawful and negligent rate of speed complained of by the plaintiff consist of?

"7. What is the maximum lawful rate of speed at which a train may approach and pass the Stanhope crossing going south?

"8. What constitutes unlawful speed of a train in approaching and passing said Stanhope crossing?

"9. What constitutes the acts of negligence of which the defendant was guilty at the time of the accident complained of in the petition?"

The plaintiff has filed a motion in which he moves the court to strike off the interrogatories attached to the answer, and as reason therefor, says, that they are impertinent, incompetent, not within the intent of the statute, because they call for facts not known to the fiduciary plaintiff; that the facts called for are particularly within the knowledge of the defendant's agents and employes, because it is an attempt to shift the burden of proof on the question of contributory negligence.

No brief has been filed by either the plaintiff or defendant upon this motion.

Considerable investigation has been given the question raised by this motion for the reason that the interrogatories invoke a privilege but rarely exercised in this court, and concerning which but few reported cases are found in this state. The interrogatories are asked by virtue of Rev. Stat. 5099 (Lan. 8614), which reads as follows:

"Interrogatories may be annexed to a pleading.

"A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath, by the party to whom they are propounded, or if such

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party is a corporation, by the president, secretary, or other officer thereof, as the party propounding requires."

So far as my knowledge goes, resort has not been had to interrogatories in negligence cases, and as their use would have an important effect in practice, the issue raised is deemed of considerable importance.

In the case of *Chapman v. Lee*, 45 Ohio St. 356 [13 N. E. Rep. 736], Judge Spear in rendering the opinion of the court says, commencing on page 365:

"Suits for discovery, were, in equity practice, auxiliary proceedings, brought not to obtain any equitable remedy, nor to establish any equitable right, but to aid in maintaining a legal right, and in prosecuting actions pending, or to be brought, in a court of law. If a party could not succeed without the aid of facts within the personal knowledge of his adversary, he might file his bill, setting forth all the facts within his knowledge, and adding interrogatories which the other party was required to answer fully under oath. No relief beyond the answer desired need be asked, and no decree made, and as soon as the answer was complete the function of the equity court ordinarily was ended, but the answer so far as responsive, could be used by either party in the trial at law. We will not be understood as meaning that it was not common for a court of equity, having taken cognizance of a case for one purpose, to retain it for all purposes, and award complete relief though the final remedy was of the kind which might be conferred by a court of law. Such result often followed where discovery was sought as an incident to equitable relief, covering the whole controversy. But where a court of law had ample power to award full relief, a court of equity ordinarily refused to take cognizance of the case, and there clearly is more conclusive reason for such refusal, in a case like the one at bar, under our present practice. All the aid which a suit for recovery would give is now given by our code in the case at law itself. The party may attach to his pleading interrogatories which, so far as pertinent, the other party is bound to answer, and those answers may be used by either party as evidence. He may also take the deposition of the opposite party, or put him on the stand as a witness at the trial. The doctrine and rules concerning the subject-matter of discovery established by courts of equity, are believed to be still in force and to control the same matters in the new procedure, but the bill of discovery, as a separate action, is practically obsolete in this state."

Here we find defined by our Supreme Court, suits for discovery, the right of a party to invoke such action, to thus ascertain the facts within the personal knowledge of his adversary, and that an answer

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responsive can be used by either party in the trial at law, as evidence. Also the declaration of the Supreme Court that the bill of discovery, as a separate action, is practically obsolete in this state; that it has been superseded by interrogatories provided for in Rev. Stat. 5099 (Lan. 8614), above quoted, and that the rules concerning the subject-matter of discovery established by courts of equity are still in force and to control the same matters in the new procedure. It therefore becomes important to determine what the rules of practice were, in the use of bills of discovery, and the rights of parties relating thereto.

An action for discovery is provided for in Rev. Stat. 5293 (Lan. 8805), which reads as follows:

“Action for discovery.

“When a person claiming to have a cause of action, or a defense to an action commenced against him, is unable, without a discovery of the fact from the adverse party, to file his petition or answer, such person may bring his action for discovery, setting forth in his petition the necessity of such discovery, and the grounds thereof, and such interrogatories relating to the subject-matter of the discovery as may be necessary to procure the discovery sought, which, if not demurred to, shall be fully and directly answered under oath by the defendant; and upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable.”

Concerning discovery, it is said:

“It must show that defendant is capable of making discovery of the facts sought. The bill should allege that the facts can be proved by defendant. It must also allege that the facts are not within complainant's knowledge. * * * It cannot be maintained to discover matter whereof complainant has the same means of information as has defendant.” 14 Cyc. 313.

“It must show that the facts, discovery of which is sought, are necessary to complainant's case, and not facts by which his adversary intends to establish his case.” 14 Cyc. 314.

Grounds of pleas to bills of discovery are classified as follows:

“To the jurisdiction, to the person, to the bill or frame of the bill, and in bar.” 14 Cyc. 318; Story, Equity Pleading Sec. 816.

“The examination will not be permitted for the purpose of ascertaining whether the applicant has a cause of action or defense, or whether he has a cause of action against persons not parties, or to ascertain against which of certain parties he has a cause of action, or to ascertain which of two causes of action he has, or to ascertain the evidence on which the opposite party bases his cause of action or defense, or to ascertain the names of his

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witnesses, or for the purpose of aiding the party in the preparation of his case for trial, or to prove matters within the applicant's own knowledge. So it will not be granted for the mere convenience of the party, nor to establish facts pertinent to the decision of a motion, nor for the purpose of gratifying public curiosity." 14 Cyc. 342.

Referring to statutory interrogatories, it is said:

"They must be such as could be properly propounded in a bill of discovery. * * * They must be concerning matters material to the issue and to the case of the party filing them. * * * The interrogatories must inquire as to matters of fact and not of law." 14 Cyc. 353.

In the Cyc. above quoted, a large number of authorities are cited upon the various propositions, to which attention of counsel is invited.

In the case under consideration, the plaintiff prosecutes in a representative capacity, and it is patent that he could have no personal knowledge concerning the accident, that he could only speak, in answer to questions, by hearsay, and as matter of belief, based upon information acquired from others. From the authority above quoted, it is learned that the party answering must speak from his own knowledge, and this is the rule laid down in our Supreme Court, *Chapman v. Lee, supra*, in which it is said that if a party could not succeed without the aid of facts within the personal knowledge of his adversary, he might file his bill, etc. In the same opinion it is said that the answers, when given, become evidence for either side. Certainly it was not the contemplation of the Supreme Court, in establishing this rule, to disregard the rules of evidence and permit answers to interrogatories to become competent evidence, either for the party answering or for the adverse party, based wholly upon hearsay, given merely as a matter of opinion, and without personal knowledge. It follows, for these reasons, that all questions asked concerning the conduct of the plaintiff and of the defendant, at the time of the accident, are not proper interrogatories and should be stricken off.

This includes question one, which inquires concerning the care exercised by the decedent in approaching the crossing; question two, as to the gait or speed of the horse; question three, as to whether the decedent looked and listened for the approaching train; question four, whether the decedent had full control of her horse at the time of and just previous to the accident; question five, as to the speed of the train. The other questions, viz., as to what the alleged negligent rate of speed consisted of; seven, What is the maximum lawful rate of speed at which a train might approach a crossing? And eight, What constitutes unlawful speed of a train in approaching said crossing? ask for questions of fact to be determined by a jury, concerning the rights

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and duties of the parties, and do not ask for facts as to what took place at the time of the accident. Furthermore, these questions and all the preceding questions are, from the nature of the transaction, more peculiarly within the knowledge of the defendant than that of the plaintiff.

Question nine asks what constitutes the acts of negligence of which the defendant was guilty at the time of the accident complained of in the petition. This interrogatory involves a question of pleading not of fact, and if the petition does not sufficiently allege the facts concerning the accident, it would be subject to a motion to make it more definite.

It is further a well-established rule that interrogatories cannot properly be asked except concerning matters pertinent to the pleading to which they are attached.

"The interrogatories authorized by Sec. 105 of the civil code * * * must be confined to matters stated or referred to in the pleadings.

"It was a well-known practice in chancery, borrowed, it is said, from the civil law, to insert in the bills special interrogatories. This was in many cases, highly beneficial to sift the conscience of the defendant. But it was a rule that the interrogatory part should be construed according to the alleging part, and the defendant was not bound to answer any interrogatories which did not grow out of antecedent matter stated or charged in the bill." *Devore v. Dinsmore*, 2 Dec. Re. 600 (4 W. L. M. 144).

The first paragraph of syllabus in *Downie v. Nettleton*, 24 Atl. Rep. 977 [61 Conn. 593], which was an action upon a statute similar to ours, reads as follows:

"Section one, providing that defendant at any time after answer may ask for a disclosure of facts material to the defense and within the knowledge of the adverse party, gives a right to such disclosures only as a court of equity might order, and does not entitle defendant, in an action for the conversion of personal property, to call for a statement of the facts on which the plaintiff's claim of title is based."

In the opinion it is said, page 978:

"The statute only applies when the case of the party invoking its aid, or some material part of it, is within the exclusive knowledge or possession of the adverse party."

"That which is emphatically called in equity proceedings a 'bill of discovery' is a bill which asks no relief, but which simply seeks the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds, or writings, or other things in the possession or power of the defendant, in order to maintain the right or title of the

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party asking it in some suit or proceeding in another court." Story, Eq. Jurisp. Sec. 1483.

"The fundamental rule on this subject is, that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined to facts which are material to his own title or cause of action. It does not enable him to pry into the defendant's case or find out the evidence upon which that case will be supported. The plaintiff is entitled to a disclosure of the defendant's title and to know what his defense is, but not to a statement of the evidence upon which the defendant relies to establish it." Pomeroy, Eq. Jurisp. Sec. 201.

"The statute was not designed to enlarge the scope of an equitable principle, but simply to enable a court of law, in administering legal remedies, to exercise a clearly defined power of a court of equity." *Downie v. Nettleton, supra*.

"Interrogatories presented under Sec. 155 of the practice act should relate to the case of the party presenting them and not be used for the mere purpose of prying into the case of his adversary." *Wolters v. Trust Co.* 46 Atl. Rep. 627 [65 N. J. Law 130].

In 1 Nash, Pl. & Pr. (5 ed.) 247, it is said:

"These provisions introduced the practice of seeking discovery in actions at law as well as in suits in equity. The code at first ignored altogether the law of discovery and substituted for it the examination of a party as a witness. These answers to interrogatories are substituted for a deposition when this course has been pursued. It declares that on the trial such answer would be used as evidence by either party. If this means that the party answering can use it as evidence, even to matters in his favor which would not be competent if inserted in a deposition or given orally, then no prudent counsel would advise the filing of interrogatories and it would only be setting a trap to be sprung by an adversary against himself. * * * Lord Campbell, C. J., in *Whatley v. Crowter*, uses the following language in reference to this matter: 'What is the interpretation to be put upon that? I think it is to cite an interrogation and say * * * that if questions may be asked on interrogatories which might be asked if the party was a witness at the trial. I think the interrogatories must be confined to matters which might be discovered by a bill of discovery in equity. I adopt the rule in the very terms used by Sir. James Wigram, that the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or its evidence which relates exclusively to his case. You may inquire into all that is material to your own case,

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though it should be in common with that of your adversary, but you may not inquire into what is exclusively his case. The English rule is the reasonable one, that the party is confined to his own case and has no right to interrogate the opposite party as to what his case will be, when he may choose to present it.

"Such a construction of the statute would lead to great abuses. Parties would be inquiring as to the evidence of the party in order that he might obviate the effect of it when it should be presented. Each party is to propound his interrogatories when he files his pleading. The plaintiff with his petition or reply, the defendant with his answer. The case, as it stands when the interrogatories are filed, is the case pertinent to which the discovery is sought. No evidence is pertinent to the case on the filing of the petition, but the case made in the petition, by evidence supporting the case of the plaintiff. When the defendant files his answer then the pertinency of the interrogatories are dependent upon the nature of the answer, and interrogatories may be presented on the issue or issues thus made."

In this case the plaintiff's right of action is based upon the alleged negligence of the defendant, and the action must stand or fall accordingly as the defendant may have been or may not have been negligent.

On the trial, the defendant is not required to make a defense until the other side has made a cause of action against it.

The answer of the defendant to which the interrogatories are attached, is in effect a denial of negligence on its part; that is to say, that it was running its train at the time of the accident, in a proper manner. The defendant can only make interrogatories, the answers to which are pertinent to that defense, and peculiarly within the knowledge of the plaintiff. All questions concerning the conduct of the plaintiff's decedent are pertinent only to the petition and not to the answer, and those which inquire concerning the conduct of the defendant are peculiarly within the knowledge of the defendant and not of the plaintiff.

The rule is well established that the right to make interrogatories may be invoked by a plaintiff when the facts upon which his right of action are based are not within his knowledge, but within the knowledge of the defendant, and it is essential to a proper presentation of his case that he be in possession of those pertinent facts known only to the defendant.

An examination of cases in which this remedy has been invoked, will disclose the kind of actions to which it is applicable.

Newburg Petroleum Co. v. Weare, 44 Ohio St. 604 [9 N. E. Rep. 845], was an action by the owner of a certain interest in oil leases, to recover the value of the oil produced applicable to his interest in the

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lease. Knowledge as to the amount of oil produced and to which he was entitled to a part, reposed only in the defendant company producing the oil.

Chapman v. Lee, 45 Ohio St. 356 [13 N. E. Rep. 736], was an action brought by attorneys to discover the terms on which an action had been settled with their clients, in which by virtue of their contract, they were entitled to a certain proportion, and which information they could only acquire from the defendants themselves.

It has been held that the right to examine the opposite party is co-extensive only with the right to use the deposition of the adverse party; but the question as to whether one party has a right to take the deposition of the adverse party where there is no reason to apprehend that he will not be present at the trial, where he may be used as a witness, has not been definitely settled in this state. I am not aware that the Supreme Court has made any ruling on this question.

It is held in *Humphrey, In re*, 7 Circ. Dec. 603 (14 R. 517), that in the interest of good practice, fair dealing between parties, and in the interest of justice, neither party should have the right to take the deposition of the other, where the only object is to find out that to which he will testify. Somewhat to the contrary is the holding in *Hafer, In re*, 12 Circ. Dec. 102 (21 R. 445); *Smith v. Moore Co.* 9 Circ. Dec. 751 (19 R. 617).

While, as has been heretofore said, but little use has been made of interrogatories in this state, resort has not been had to their use, so far as my investigation goes, in actions based upon negligence, and it is obvious from their nature, that ordinarily at least, conditions would be such as to prevent their use under the rules and reasons herein given.

It is held in *Rindskopf v. Platto*, 29 Fed. Rep. 130, that a bill for discovery in aid of an action at law, cannot be maintained where full discovery may be compelled by examination of the adverse party as a witness in the suit at law.

It is alleged in the answer of the defendant "that the decedent, by her own negligence, contributed directly and proximately to the accident and injury of which the plaintiff complains." By reason of this allegation, it may be claimed that some of the interrogatories are pertinent, as bearing upon the question of contributory negligence, but of what value is such an allegation?

It is suggested that this allegation is not one of fact, but simply a conclusion. The rule formerly prevailed that under such allegation, acts of contributory negligence on the part of the plaintiff might be proved but the practice now is, on motion to require such allegations to be made more definite by specifically stating the acts of negligence complained of.

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It has been held by our own circuit court that actionable negligence must be alleged before it can be made a ground for recovery.

Lake Shore & M. S. Ry. v. Reynolds, 11 Circ. Dec. 701 (21 R. 402).

And in the *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326, 333 [64 N. E. Rep. 130], it is said:

"Upon trial the evidence should be confined to the acts of negligence so specifically and definitely averred in the petition."

If, before evidence can be introduced of negligence, in the petition, it must be definitely and specifically stated, why should not the same rule prevail regarding affirmative matter of contributory negligence in an answer, inasmuch as Rev. Stat. 5066 (Lan. 8581) provides:

"The answer shall contain: * * *

"2. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language."

"If defendant wishes to rely upon the rule that the plaintiff must prove his case, the general denial would accomplish his purpose. If he intends to go beyond this, and to avail himself of a defense, notwithstanding that negligence may be proved against him, by showing contributory negligence on the part of the plaintiff, he must state his facts upon which he relies, from which negligence could be inferred." *McInerney v. Chemical Co.* 118 Fed. Rep. 653, 655.

It may be easily perceived that answers to the inquiries propounded in this case would be very convenient to the defendant, and perhaps beneficial to its interests in learning in advance of the trial, the position and evidence of the adverse party upon various propositions, yet that desire cannot properly be granted, by reason of the rules and authorities cited and the reasons herein given.

The motion is allowed.

Organ Co. v. Crambert.

CHATTEL MORTGAGES—CONDITIONAL SALES.

[Superior Court of Cincinnati, General Term, January, 1907.]

Ferris, Hosea and Hoffheimer, JJ.

COTTAGE ORGAN CO. V. MINNIE CRAMBERT.

SALE OF CHATTEL WITH MORTGAGE CONSTRUED TO BE CONDITIONAL SALE.

A contract of sale of a piano, upon the installment plan, the title to pass to the purchaser upon completion of all the deferred payments, evidenced by a chattel mortgage in printed form and containing the customary provisions, a covenant in smaller type, providing that upon removal, seizure on legal process, failure to keep insured, breach in any other condition or failure to pay purchase money notes, all of said notes shall become due and payable and the mortgagee may take the piano in possession, and containing further a printed notice apart from the mortgage proper that the mortgage is subject to the approval of the principal, named, contains all the agreements of sale and that no agent or salesman is authorized to make any promise differing in anywise from the written or printed portions thereof, is a conditional sale within the meaning of Rev. Stat. 4155-3 (Lan. 6850); and the purchaser having offered to return the piano upon refunder of one-half the amount paid, is entitled, upon dispossession of the property by writ of replevin, to the statutory amount by way of damages.

[For other cases in point, see 7 Cyc. Dig., "Sales," §§ 502-547.—Ed.]

[Syllabus approved by the court.]

ERROR to special term.

Stephens, Lincoln & Stephens, for plaintiff in error.

C. J. Fitzgerald and J. P. Ryan, for defendant in error:

Authority of agent. *McCormick Harvesting Mach. Co. v. Snell*, 23 Ill. App. 79; *Shackman v. Little*, 87 Ind. 181; *Meister v. Dryer Co.* 11 Ill. App. 227; *Evans, Prin & Agent* *173; *Deming v. Railway*, 48 N. H. 455 [2 Am. Rep. 267]; *Mechem, Agency Sec.* 279; *Gordcen v. Pearlman*, 91 N. Y. Supp. 420; *Webster v. Wray*, 17 Neb. 579; *Creighton v. Finlayson*, 46 Neb. 457 [64 N. W. Rep. 1103].

Conditional sales. *Speyer v. Baker*, 59 Ohio St. 11 [51 N. E. Rep. 442].

HOSEA, J.

The plaintiff in error (plaintiff below) sued in replevin, under a chattel mortgage, to recover possession of a piano, with damages for detention. Possession was taken under an order of delivery. The defendant answered, alleging that the sale was a conditional sale, and that the piano was retaken into possession by plaintiff without tender or refunder of any part of the purchase money paid by her on account of said sale, and she asks \$50 damages.

From a verdict and judgment sustaining defendant's contention and awarding \$41 damages, error is prosecuted to this court.

Superior Court of Cincinnati.

In the argument and briefs here the sole contention presented is whether the statute relating to conditional sales has application to the case.

The plaintiff, to sustain the issue below, offered a chattel mortgage and the unpaid notes secured thereby—it being admitted that the first twelve notes of the series had been paid—and rested. The defendant thereupon offered testimony to show her negotiation of the purchase from Mr. Mowrey, a salesman at plaintiff's establishment in Cincinnati, at a cash down payment of ten dollars and an agreement to pay the balance in monthly installments of six dollars each; and was told that the piano would be hers when all installments were paid. Papers were presented to her to sign, which she signed without reading, and they were retained by the plaintiff. The piano was delivered in one or two days thereafter and remained in her possession until taken upon writ in the replevin suit.

The chattel mortgage was a printed form containing customary provisions, and a further covenant, in smaller type, providing that upon removal of the chattel or seizure on legal process or failure to keep insured, or breach in any other condition, or failure to pay any purchase money mortgage note, all of said notes should become thereby due and payable and the mortgagee might take the piano into possession. It does not appear to have been recorded, and lacks the affidavit of good faith required for record. There is also upon the same paper a printed notice, in smaller type, apart from the mortgage proper, that this mortgage is subject to the approval of the Cottage Organ Company, and that it contains all the agreements pertaining to the sale, and that, "No agent or salesman is authorized to make any promise or contract differing in anywise from that which is written or printed hereon."

It is claimed by plaintiff in error that the transaction thus evidenced was not a conditional sale, under the statute, but a sale outright to which the statute has no application.

It will be noted that the document declared upon by plaintiff as the exclusive basis of the right of action is a chattel mortgage whose conditions and default he recites in his petition. The document presented in evidence to sustain his contention contains something more, namely, a so-called "notice," purporting to recite that the mortgage contains all the conditions of the sale. The introduction of the mortgage is permissible solely by virtue of its character as such in view of the pleading. The so-called notice, however, is no part of it, and was properly objected to. But even if considered in the case, it has no stronger character than an admission against interest, a mere collateral statement in relation to the mortgage, and was open to explanation.

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The question whether the transaction was a sale absolute or conditional was properly left to the jury, who determined it upon the testimony to be a conditional sale. The positive terms of the statute governing conditional sales (Rev. Stat. 4155-3; Lan. 6850), require a refunder of one-half the amount paid before retaking possession of the property sold.

The character of the abuses for which the statute was intended as a remedy is set forth in the case of *Caldwell v. Manufacturing Co.* 4 Circ. Dec. 680 (7 R. 460), wherein it was held that where the contract is for deferred payments as embodied in the chattel mortgage (as in the case at bar)—that is to say, where the title is retransferred by the purchaser to the seller as part of the same transaction as the purchase—the statute applies. In that case, however it is said that procedure in foreclosure, or in replevin, would have avoided the statute. This case was affirmed by the Supreme Court in *Singer Mfg. Co. v. Caldwell*, 55 Ohio St. 638, “upon the grounds stated in the opinion below.”

The main proposition was again decided by the circuit court, in *Baker v. Speyer*, 5 Circ. Dec. 335 (12 R. 118), and the latter case was taken to the Supreme Court, whose opinion is reported in *Speyer v. Baker*, 59 Ohio St. 11 [51 N. E. Rep. 442]. It appears from the report of the latter case that the question arose directly upon a suit in replevin—as does the case at bar—and upon the legal character and effect of the terms and conditions of the chattel mortgage, which contains substantially the provision of that of the case at bar; and that an offer was made and refused—as here—to return the property upon refunder as required by the statute. The gist of the holding is, that the statute applies to all sales of chattels made on deferred payments on condition of title remaining in vendor until payment completed: and that no instrument exacted by the vendor at the time of such sale shall preclude an inquiry into the real nature of the transaction. It is also held that the purchaser is entitled to possession after default until the statutory refunder is made; and that a replevin dispossessing the vendee of the property is such a taking into possession as entitles the vendee to the statutory refunder by way of damages, as the value of his right of possession.

It had already been decided, in *Albright v. Meredith*, 58 Ohio St. 194 [50 N. E. Rep. 719], that a chattel mortgage was not inconsistent with the status of a conditional sale; that in such case the interest of the purchaser, acquired by part payment, was sufficient to support a chattel mortgage. In that case the possession by virtue of a personal judgment and execution thereon was held to be a taking possession under the conditional sales act, upon the ground that it was an elec-

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tion to treat the property as belonging to the vendee, and consequently a waiver of the equitable lien with its remedy of foreclosure.

It may be noted in this connection that the dictum in *Weil v. State*, 46 Ohio St. 450 [21 N. E. Rep. 643], (that possession acquired by replevin is not a taking contemplated in the conditional sales act, because it is a legal process) is inconsistent with the opinion of the same judge in *Speyer v. Baker*, *supra*; and that the later and authoritative view is, that any taking into the personal possession of the vendor, whether by manual seizure, or by seizure into personal possession through legal process for that purpose in the case of a conditional sale, is within the statute.

In view of these authorities, and it appearing that all the assignments of error are based upon the view that the present transaction is not a conditional sale, and this question being left to, and, as we think, rightly determined otherwise by, the jury, the judgment below must be affirmed, and it is so ordered.

Judgment affirmed.

Ferris and Hoffheimer, JJ., concur.

WILLS.

[Greene Common Pleas, February 4, 1907.]

EUGENE C. PORTERFIELD, ADMR. v. EUGENE C. PORTERFIELD ET AL.

1. CROSSING OUT A CLAUSE IN A WILL, BY TESTATOR, DOES NOT REVOKE.

A clause in a will cannot be revoked by the testatrix's drawing ink lines through the words. The erasure will be disregarded and such clause will be regarded as a valid part of the will.

[For other cases in point, see 7 Cyc. Dig., "Wills," §§ 145-149.—Ed.]

2. THE SAVING CLAUSE OF STATUTE OF WILLS RELATES TO BLOOD RELATIONS.

Under the saving clause of Rev. Stat. 5971 (Lan. 9510), to prevent the bequest from lapsing, the legatee included within the phrase, "or other relative," must be related by blood to the testator, and not by marriage.

[For other cases in point, see 7 Cyc. Dig., "Wills," §§ 588-683.—Ed.]

3. STATUTE TO PREVENT FAILURE OF DEVISEE APPLIES TO NEPHEWS AND NIECES.

The provision of the statute of wills, Rev. Stat. 5971 (Lan. 9510), providing against the failure of a devisee, applies to nephews and nieces as a "class" as well as to children as a "class."

[Syllabus by the court.]

O. R. Krickenberger, for plaintiff:

Whether the words "or other relative" in Rev. Stat. 5971 (Lan. 9510) included relatives by affinity or should be limited to relatives by consanguinity. *Keniston v. Adams*, 80 Maine 290 [14 Atl. Rep. 203]; *Esty v. Clark*, 101 Mass. 36 [3 Am. Rep. 320]; *Kimball v. Story*, 108

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Mass. 382; *Bramell v. Adams*, 146 Mo. 70 [47 S. W. Rep. 931]; *Cleaver v. Cleaver*, 39 Wis. 96 [20 Am. Rep. 30].

Charles Darlington, for W. B. Flint.

KYLE, J.

This is an action to construe a will. Mrs. M. B. Conover, the testatrix, among other bequests, devised to Lucy Flint, to "brother Morgan's wife" and to Willie Brown \$500 each, with a residuary clause, that "Any money left divide equally between my nephews and neices." The bequest to Willie Brown or heirs of \$500 was crossed out. Below the will were two indorsements signed by the testatrix. The first one, "Since Aunt Mary Morgan has died her \$500 divide between my nephews and nieces." The same statement follows with reference to the bequest to Lucy Flint.

The evidence shows that "brother Morgan's wife" and "Aunt Mary Morgan" are the same person, and was Mary Morgan Brown, wife of Morgan Brown, a brother of the testatrix. Mary Morgan Brown died before the testatrix, leaving two heirs, Nellie B. Lain and William Brown. Lucy Flint died before the testatrix, leaving Weston B. Flint her sole heir.

The first question that is presented is whether the erasure of the bequest to "Willie Brown" upon the face of the will or the two statements below, directing a different distribution of each bequest to the two persons named in the will by reason of their death, and signed by the testatrix affects the provisions of the will or works a revocation of all or any part.

The attempted erasure of the clause on the will is to be disregarded, and the erased clause shall be regarded as a valid part of the will and the bequest go to the person as originally written in the will. *Giffin v. Brooks*, 48 Ohio St. 211 [31 N. E. Rep. 743].

The two clauses directing a different distribution of the two bequests are not codicils, as they are not witnessed as provided by law; they cannot work a revocation for that is not one of the ways provided in Rev. Stat. 5953 (Lan. 9491), and should be disregarded. Does the legacy to Mary Morgan Brown lapse under Rev. Stat. 5971 (Lan. 9510)? She was a sister-in-law of the testatrix. The question to be determined is, Does she come within the meaning of Rev. Stat. 5971 (Lan. 9510), under the saving clause so that her issue could take the legacy? This depends upon what construction is given the words in that section of "or other relative." If the testatrix leaves a legacy to a "child or other relative" and the legatee dies before the testatrix the legacy is saved to the issue of such persons. But must the "other relative," the legatee named, be of the blood of the testatrix? If so then as Mrs.

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Brown, the sister-in-law, was a relative by marriage only—that is a relative by affinity—she does not come within the terms of this statute. This precise question has not been passed upon in any adjudicated case in this state. The children of Mary Brown in this case are nephews by blood of the ancestor, but if the children of Mary Brown were by a husband other than the brother of the testatrix such children would not be of the blood of the testatrix. In that case the property would be diverted from the blood of the ancestor.

The general policy of the law in providing for a disposition of property is to keep it within the blood of the ancestor.

If the language of the statute, “child or other relative,” be given its natural construction such language would be held to mean that the term, “or other relative,” applies only to persons of the same kind of relationship to the testatrix as is sustained by a “child;” that is, by blood.

The fact that the children of Mary Brown in this instance are related by blood to the testatrix could not enlarge the meaning of the term, “or other relative,” in the connection in which it is used as applied to the legatee. It is the deceased legatee that must sustain a blood relationship to the testatrix in order to come within the meaning of the clause, “or other relative,” in Rev. Stat. 5971 (Lan. 9510). Mary Morgan Brown being a sister-in-law to the testatrix does not come within the saving clause, “or other relative,” and her heirs are barred and the legacy to her lapses.

As Lucy Flint was a niece by blood to the testatrix, her legacy will go to Weston B. Flint, her sole heir, under Rev. Stat. 5971 (Lan. 9510), notwithstanding the statement signed at the end of the will.

Another question for consideration is, how the parties take under the residuary clause, “Any money left divide equally between my nephews and nieces.” Under *Wooley v. Paxson*, 46 Ohio St. 307 [24 N. E. Rep. 599], it has been held that the provisions of the statute of wills providing against the failure of the devise to a child or other relative of the testator by the death of the devisee in the life of the testator (Rev. Stat. 5971; Lan. 9510) applies to the devise to “children” as a class.

I can see no reason why the principle announced would not be the same if applied to nephews and nieces as a “class” as well as to children as a “class.” It is true that they are more remote from the testator, yet that would not affect the application of the same principles. It follows that, although Lucy Flint died before the testatrix, her issue take the share of the residuum she would have taken had she survived the testatrix.

An order may be taken accordingly.

State v. Summit Co. (Comrs.)

COUNTY DEPOSITARIES.

[Summit Common Pleas, September 17, 1906.]

*STATE EX REL. ALVIN D. ALEXANDER V. SUMMIT CO. (COMRS.) ET AL.

COUNTY DEPOSITARY LAW DOES NOT VIOLATE CONSTITUTION AS DENYING EQUAL RIGHTS AND EQUAL BENEFIT NOR AS NOT HAVING UNIFORM OPERATION.

The county depositary law as found in 98 O. L. 274-279, does not violate Secs. 1 and 2, Art. 1 of the constitution of Ohio, nor the fourteenth amendment of the constitution of the United States, as denying equal rights and equal protection and benefit to all persons, for the county is a mere *quasi*-corporation, subject to the control of the legislature, and complaint as to any discrimination as to individuals or certain classes of private corporations becoming the depositaries of the county funds must be addressed to the legislature. Nor does this law violate Sec. 26, Art. 2 of the constitution of Ohio, as there is uniform operation where there are like conditions.

2. BANKING CORPORATION HAVING BRANCH BANK IN COUNTY BUT PRINCIPAL OFFICE AND PLACE OF BUSINESS ELSEWHERE NOT ENTITLED TO BECOME COUNTY DEPOSITARY.

Under the county depositary law (98 O. L. 274-279), the evident purpose of which is to keep the money of a county within its own borders for the use and benefit of its citizens until needed for disbursement, an incorporated banking company having its principal office and place of business in one county but having also a branch bank in another county, is not "situated" in the latter county so as to entitle it to become the depositary of the latter county's funds.

[Syllabus approved by the court.]

Slabaugh & Seiberling, for plaintiff:

A corporation cannot have more than one home and that is its charter home. Thompson, Corporations 688.

A banking corporation, in the absence of express authority in its charter or under the law, has no power to establish agencies for the transaction of business at any other place than that fixed by the charter for its residence. *People v. Geneva College (Tr.)*, 5 Wend. 211; *Underwood v. Waldron*, 12 Mich. 73; *Angell & Ames, Corporations* 107; *People v. Saginaw Circ. Ct.* 23 Mich. 492; *Attorney General v. Bank*,

*Decision of the Summit circuit court, on appeal, October, 1906.

MARVIN, J.

We have examined this case with care, and have read the opinion of Judge Wanamaker of the court of common pleas when the case was tried before him. We do not think we can improve upon that opinion, and we reach the conclusion reached by him. The same order will be made here as was made in the court below.

This disposes of the proceeding in mandamus brought against the county commissioners and treasurer. We think it is clear that the statute under which bids were received for the public moneys, confines the bidders to those banking corporations which have their *situs* in the county, and that the Cleveland Trust Company is situated not in this county, though it has a bank here, but the corporation is located elsewhere.

Upon the opinion announced by Judge Wanamaker in the court of common pleas we pronounce the judgment that the injunction prayed for in the suit by Alexander be allowed, and the mandamus brought by the trust company be dismissed.

Winch and Henry, JJ., concur.

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1 Walk. Ch. (Mich.) 90; Thompson, Corporations 690; *People v. Bank*, 1 Doug. (Mich.) 282.

A corporation may be attached in a justice court in any county other than that of its principal place of business. *Champion Mach. Co. v. Huston*, 24 Ohio St. 503.

The designation of a principal place of business of a corporation is conclusive as to the location of such office and is not in any way determined by the proportion of business done there. *Pelton v. Transportation Co.* 37 Ohio St. 450; *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Mercantile Tr. Co. v. Iron Wks.* 2 Circ. Dec. 718 (4 R. 579); *Booth v. Wonderly*, 36 N. J. Law 250.

There is no such thing known to the law as a perambulatory corporation. *Fostoria v. Fox*, 60 Ohio St. 340 [54 N. E. Rep. 370].

The county depository law, act 98 O. L. 274, is unconstitutional. *Coal Co. v. Rosser*, 53 Ohio St. 12 [41 N. E. Rep. 263; 29 L. R. A. 386; 53 Am. St. Rep. 622]; *Harmon v. State*, 66 Ohio St. 249 [64 N. E. Rep. 117; 58 L. R. A. 618]; *State v. Gravett*, 65 Ohio St. 289 [62 N. E. Rep. 325; 55 L. R. A. 791; 87 Am. St. Rep. 605]; *Williams v. Donough*, 65 Ohio St. 499 [63 N. E. Rep. 84; 56 L. R. A. 766]; *Gulf, Col. & S. F. Ry. v. Ellis*, 165 U. S. 150 [17 Sup. Ct. Rep. 255; 41 L. Ed. 666]; *Palmer v. Tingle*, 55 Ohio St. 423 [45 N. E. Rep. 313]; *State v. Ferris*, 53 Ohio St. 314 [41 N. E. Rep. 579; 30 L. R. A. 218]; *State v. Gardner*, 58 Ohio St. 599 [51 N. E. Rep. 136; 41 L. R. A. 689; 65 Am. St. Rep. 785]; *State v. Robins*, 71 Ohio St. 273 [73 N. E. Rep. 470].

H. M. Hagelbarger and Kline, Tolles & Goff, for defendants:

This action was brought by the state of Ohio ex rel. Alvin D. Alexander, a resident and taxpayer of Summit county, against L. H. Oviatt, Ever Hawkins and Philip Wagoner as commissioners, and Fred E. Smith as treasurer, of Summit county, Ohio.

WANAMAKER, J.

On July 25, 1906, the relator filed his petition in the court of common pleas, averring for his cause of action, that he was a resident and taxpayer of Summit county, Ohio, and that on July 23, 1906, the said commissioners of Summit county, pretending to act in pursuance of law, awarded to the Cleveland Trust Company, of Cleveland, Ohio, a corporation, the use of the money of said county for the period of three years, said award having been made by said commissioners in pursuance of an advertisement duly made inviting sealed proposals from banks and trust companies for the payment to said county of interest for the use of the money in said county; that in answer to said advertisement the said The Cleveland Trust Company bid for the use of said money for said period of three years at the rate of 3.32 per cent per annum, being the highest bid made; that in further answer to

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such advertisement, a large number of incorporated banks and banking institutions, located in Summit county, bid for the use of such money a rate of more than 2 per cent per annum, said banks so located in Summit county and so bidding as aforesaid being more than sufficient in number to use all of the money of said county coming into the hands of the county treasurer from time to time.

Said relator further says, that said The Cleveland Trust Company, is a corporation of the state of Ohio; with its office, location, residence and principal place of business in the city of Cleveland, Cuyahoga county, Ohio, and that it is not competent and eligible to bid for the use of said funds when there are the required number of incorporated banks and trust companies located and doing business in Summit county, Ohio, which bid 2 per cent or more for the use of said funds.

Said relator further says that the said commissioners are about to enter into a contract with the Cleveland Trust Company for the use of said county money, and will, unless restrained by this court, accept and approve an undertaking on the part of said trust company for said moneys to the amount of \$400,000.

Said relator further says that the act of the general assembly, under which said commissioners have pretended to act, was unconstitutional and void in that the said act discriminates in favor of incorporated companies and trust companies as against natural persons and unincorporated banks, trust companies and banking institutions; that the said act and award and proposed contract and order of the said county commissioners, and the said contemplated act and delivery of money by said county treasurer are illegal and void, for the reason that the Cleveland Trust Company is not a resident or situated in Summit county, Ohio, and that the said commissioners are unauthorized and unwarranted in making any award to said trust company, or entering into any contract with it in reference to said money, there being a sufficient number of incorporated banks and trust companies situated in Summit county, Ohio, that have bid for the use of said money, to use, consume and cover all of the said county money.

The relator further says, that the necessary notice, in writing, was served upon the prosecuting attorney of said Summit county to institute this action for the purpose of preventing and restraining said county commissioners from awarding the funds to said The Cleveland Trust Company, and to restrain and prevent said treasurer from paying over and delivering to said The Cleveland Trust Company said moneys under said pretended law.

The defendants, by their answer, and, by their admissions in open court, say that they are the commissioners and treasurer of Summit county, respectively, and that the relator is a resident taxpayer of said Summit county, and that the commissioners, by resolution, awarded to

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the Cleveland Trust Company, a corporation under the laws of Ohio, the use of the money of said county to the extent of \$400,000 for the period of three years; that such award was made pursuant to an act of the general assembly, passed April 2, 1906 (98 O. L. 274-279); that said The Cleveland Trust Company is a corporation, duly organized and existing under the laws of the state of Ohio, having its principal place of business at No. 1 Euclid avenue, in the city of Cleveland, Cuyahoga county, Ohio; and that said trust company has and had at, and prior to the time of making the bid referred to in the petition, a bank situated in the county of Summit and state of Ohio, to wit, in the village of Hudson therein; that said bank in said village has a full complement of officers and agents, and there transacts its general banking, trust and savings business.

Defendants further say that the bid so made by the Cleveland Trust Company was the highest and best bid for the use of the funds of said county; and admits the preliminary notice in writing, required by law, was made upon the prosecuting attorney as alleged in the petition. The reply is a general denial, save and except such things as are admissions of the matters set forth in the petition.

The issues growing out of the pleadings, the admissions and waivers made by the parties to this cause in open court, resolve themselves into two propositions:

First. Is said act of the general assembly providing for county depositories, as found in 98 O. L. 274-279, unconstitutional by reason of Secs. 1 and 2, Art. 1 of this constitution of the state of Ohio, and Sec. 26, Art. 2 of the constitution of the state of Ohio.

Section 1, Art. 1, commonly spoken of as the bill of rights of the constitution of the state of Ohio, reads as follows:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Section 2, Art. 1, reads as follows:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary," etc.

Section 26, Art. 2, reads:

"All laws, of a general nature, shall have a uniform operation throughout the state," etc.

The relator claims that the right and privilege of acquiring and possessing property, as defined by Sec. 1, Art. 1, and the right to equal protection and benefit, under favor of Sec. 2, Art. 1, are denied to natural persons by the provisions of the so-called county depository law

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(98 O. L. 274), which limits those eligible to bid for and receive the county funds to "a bank or banks or trust companies * * * duly incorporated under the laws of this state, or organized under the laws of the United States."

The relator further claims that by reason of Sec. 1 of said depositary law providing, "where the county seat in any county has no bank of the description as defined in Sec. 1 of this act, that any private bank may be authorized to receive such funds, provided they give security to sufficiently cover such deposit," etc., and that by reason of the fact that a private bank is eligible to bid for and receive such county funds in some counties of the state where no incorporated banks are situated, and private banks in other counties where incorporated banks are situated, are not eligible to bid for and receive the award for such funds, that this would be such a failure of uniform operation in a statute dealing with matters of a general nature as to be violative of said Sec. 26, Art. 2, of the constitution of Ohio.

In addition to the constitutional questions, there is raised the mixed question of law and fact as to whether or not the Cleveland Trust Company, which has its principal place of business located at No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio, and a branch bank doing business in Hudson village, Summit county, Ohio, is situated in Summit county, Ohio, within the provisions of the depositary act.

It is rather surprising to find that while a large number of states have had, for a long term of years, depositary laws similar to the Ohio statute in question, there have been no adjudications upon constitutional questions of a like character to those that have been raised in this case; and the fact that such statutes in other states have been so long acquiesced in by the public without questioning their constitutionality in these respects, would certainly lead the court to hesitate and to act with much reluctance in declaring such a statute unconstitutional. The public policy of abundantly protecting the public funds and providing for their earning a fair interest during the period that they may not be required for purposes of disbursement, and furnishing the business public with needed capital for the usual and customary purposes of trade and commerce, are so manifestly wholesome and in the interests of the public welfare, as to advise judicial sanction, unless clearly and manifestly prohibited by constitutional limitations.

The presumption is always in favor of the validity and constitutionality of the law; and it is only when a manifest assumption of authority and a clear incompatibility between the constitution and the law appear, that the judicial power will refuse to execute it. Judge Ranney in *Cin. W. & Z. Ry. v. Clinton Co.* (Comrs.) 1 Ohio St. 77; and many other Ohio cases to same effect.

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While this is a mere legal axiom, its foundation, reason and necessity are of interest.

"The legislature is, of necessity, in the first instance, to be the judge of its own constitutional powers. Its members act under an oath to support the constitution, and are in every way, under responsibilities as great judicial officers. Their manifest duty is, never to exercise a power of doubtful constitutionality. Doubt, in their case, as in that of the courts, should be conclusive against all affirmative action. This being their duty, we are bound, in all cases, to presume that they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book. If a court, in such case, were to annul the law, while entertaining doubts upon the subject, it would present the absurdity of one department of the government, overturning in doubt, what another had established, in settled conviction; and to make the dubious constructions of the judiciary, outweigh the fixed conclusions of the general assembly." *Cin. W. & Z. Ry. v. Clinton Co. (Comrs.) supra*, page 83.

No question is raised that the subject-matter involved in the legislation in question, is not within the legislative power of the general assembly. The general assembly's legislative power is almost plenary and absolute. Section 1, Art. 2 of the constitution of Ohio reads:

"The legislative power of this state shall be vested in a general assembly, which shall consist of a senate, and house of representatives."

"It will be observed, that the provision is not, that the legislative power, as conferred in the constitution, shall be vested in the general assembly, but that the legislative power of this state shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted." *Baker v. Cincinnati*, 11 Ohio St. 534-542.

"Such prohibition must either be found in express terms, or be clearly inferable, by necessary implication from the language of the instrument, when fairly construed according to its manifest spirit and meaning. *Cass v. Dillon*, 2 Ohio St. 607; *State v. Dudley*, 1 Ohio St. 437." *Lehman v. McBride*, 15 Ohio St. 573-592.

Do either of the three sections of the constitution called in question in this case expressly or by clear inference prohibit the enactment of the statute in question; or, are the terms and provisions of the statute, so far as applicable to the case at bar merely a matter within legislative discretion?

A county is merely one of the political subdivisions of the state, created only for public purposes, to facilitate and promote the administration of the state government. *Sangamon Co. (Suprs.) v. Springfield*, 63 Ill. 66; 11 Cyc. 65. It is not a public corporation as is a city

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or village, it is not vested with a single attribute of sovereignty, but is merely a territorial division of the state for purposes of political organization and civil administration in public affairs. *Cin. W. & Z. Ry. v. Clinton Co. (Comrs.)* 1 Ohio St. 77.

When the taxpayers of the county have contributed to the county treasury such sums as are lawfully assessed against them, the fund so created has become the property of such county or political subdivision of the state, and the individual taxpayer has lost substantially all right, title and interest in and to said fund, save and except what he may have in order that such fund may be applied only for the purposes for which it was levied and collected, or for such purposes as may be authorized by law. In the county treasury, it is the property of the state, or rather of a political subdivision of the state—a county.

Does either Sec. 1 or Sec. 2 include within its terms and provisions, either expressly or by necessary implication, the state of Ohio as a unit or any of its political fractions, such as a county? A careful reading and consideration of those sections find the word “men” used in the first section, referring manifestly to natural persons and such artificial persons as private corporations who are similarly situated with respect to the subject-matter under consideration. Section 2 used the word “people” as synonymous with men, and evidently equal in scope and comprehension, and has substantially the same application. In both sections the terms “inalienable rights” and “equal protection and benefit” relate to private, personal, civil or political rights of natural persons only, which by force of legislative enactment and judicial interpretation have been extended to private corporations similarly situated with reference to the subject-matter under consideration. But the court is unable to find any authority or adjudication whatsoever that has undertaken to extend the provisions of these sections to a state or any of its political subdivisions.

The court, therefore, holds that so far as Secs. 1 and 2, Art. 1 of the bill of rights, are concerned, that they are in no way violated or infringed upon by the legislative act in question; for the subject-matter of the statute in question is the county funds, the property of the county, a mere *quasi* corporation for governmental purposes, in which natural persons and private corporations have ceased to have any interest as to property, right or title. The court believes that any legislation with reference to the county is purely a matter for legislative discretion as far as these sections of the constitution are concerned, and though such discretion may involve an unreasonable or arbitrary discrimination as against individuals or a certain class of private corporations, such objections would not be fatal upon a constitutional question. Such discriminations should be a matter addressed to the discretion of the legislative body enacting the law.

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Numerous decisions have been made, clearly showing the plenary power that the legislature may exercise in reference to county affairs, county property and county funds. A county being created by legislative enactment, has only such powers and authority as may be conferred by the legislature. The legislature, having power to create, it likewise has the power to dissolve, and the officers of the county, in the administration of their political duties, are guided solely by legislative provisions. This is particularly true as to the collection, custody and disbursement of the public funds. Moreover, it is the well-known duty of trial courts, in case of doubt, to sustain and support all legislative enactments, especially where they are in harmony with the best public interest and general welfare.

As to Sec. 26, Const. of Ohio, requiring a statute of a general nature to have uniform operation throughout the state, the court finds that there is such uniformity of operation wherever there are like conditions, and that such section is, therefore, not in any wise violated.

As to the fourteenth amendment to the constitution of the United States, the court finds that this amendment is in no way infringed upon, the same reasoning applying as that under Secs. 1 and 2, Art. 1 of the constitution of Ohio.

The second question is: Is the Cleveland Trust Company, with its principal office and place of banking business located at No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio, under the terms, provisions and spirit of the statute in question "situated" in Summit county, Ohio, by virtue of its having a branch office or bank engaged in a general banking business at Hudson village, Summit county, Ohio?

The language of 98 O. L. 274, Sec. 1, in question is as follows:

"In each county the commissioners thereof shall designate in the manner hereinafter provided, a bank or banks or trust companies situated in such county, and duly incorporated under the laws of this state, or organized under the laws of the United States as a depository or depositories of the money of the county, provided that in any county where no such bank or trust company exists, or where such bank or banks neglect to bid as provided for herein, or to comply with all the conditions of this act, the commissioners shall designate any other bank or banks incorporated under the laws of this state or organized under the laws of the United States, located and doing business in this state," etc.

Clearly the legislature intended by this provision to give the home banks of the county the preference in bidding and in being awarded the county funds. These funds have been taken out of the arteries of the county's trade and business, and it was doubtless thought wise by the legislature that the depository should be established in some bank situated in the county, so that these funds might return to these chan-

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nels of trade and business, for use and service until they should be needed for disbursement for public purposes, and, therefore, it was provided that the depository should be situated within the county.

The charter of the Cleveland Trust Company designates No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio, as its principal place of business. It appears that said trust company has a large number of branch banks, so-called, doing a general banking business, situated in various counties adjoining Cuyahoga, one of which is located at Hudson village, in Summit county, Ohio. The undisputed evidence shows that said bank at Hudson village has the usual complement of bank officers and employes such as you would expect to find in a small village of about a thousand inhabitants, and that the deposits in cash kept on hand for daily business are about \$9,000 or \$10,000. Hudson village is located some twelve or thirteen miles from Akron, the county seat of Summit county. Under the proposed award to the Cleveland Trust Company, it would receive \$400,000 of the funds of Summit county. The evidence further shows that all excess moneys above \$9,000 or \$10,000 deposited and received at the bank at Hudson village are reported and forwarded to the Cleveland Trust Company, at Cleveland, or to such other points as the Cleveland office might order and direct. Outside of the usual and ordinary clerical work by the employes at Hudson village, the administrative and executive work of such bank is conducted at its principal place in Cleveland, which is in daily communication with the Hudson branch.

The diligence of counsel on both sides of this case has failed to find but one case which throws any light upon this question. That case is entitled, *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632 [58 N. W. Rep. 149]. The facts of that case are substantially as follows: The plaintiff was a corporation organized under the laws of Nebraska for the purpose of buying and selling butter and eggs. Its principal place of business, as fixed by its charter, was in Dodge county, and its chief officer resided there. It had and maintained in Saunders county, a place of business; there exercised its corporate functions and had there employes conducting the business for which it was organized. It was there held that the corporation was situated in Saunders county, and, therefore, under the statute of civil procedure of Nebraska, was suable in Saunders county. In the opinion of the court, it is said that a corporation is situated where it has and maintains a place of business and servants, employes or agents engaged in conducting and carrying on the business for which it exists.

A very careful search among the reports of our various courts in Ohio has disclosed one case, which throws much light on this question, viz., *Fostoria v. Fox*, 60 Ohio St. 340 [54 N. E. Rep. 370]. In that case the following facts appear:

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The city of Fostoria is located on the county line between Seneca county and Hancock county, a part of the city being located in each county, but with its principal place of business and all of its offices situated within Seneca county. Suit was brought in Hancock county by Fox against the city for mandatory injunction, requiring it to remove a dam from a stream of water, a branch of Portage river, the dam being a part of its system of works for supplying water to itself and its citizens; and for damages on the ground that the lands of the plaintiff were thereby wrongfully overflowed and injured. The dam was on the premises owned by the city, but a short distance below the lands of the plaintiff, situated on the stream above. Fox resided in Hancock county, and the property and the dam causing the injuries complained of were located in Hancock county; the summons, however, was issued by the clerk of the court of common pleas of Hancock county, and was served by the sheriff of Seneca county.

The defendant appeared for the purpose only of objecting to the jurisdiction of the court, and moved to quash the summons and set aside the service of summons made upon it, on the ground that Fostoria was a city situated within Seneca county.

The trial court overruled the motion and held that it had jurisdiction of the person of the defendant on the service as made. The defendant excepted. Issues were then made up, trial had and judgment entered against the city. It appealed to the circuit court. The same objection was there made to the court's jurisdiction; the objection was overruled, and exception taken and trial had, which resulted in judgment against the city. Error was prosecuted on various assignments to the Supreme Court especially the error that the court erred in overruling its motion to quash the summons and set aside the service made upon it.

The court, in considering Rev. Stat. 5023 (Lan. 8538), reads as follows: "An action other than one of those mentioned in the four preceding sections, against a corporation created under the laws of this state, may be brought in the county in which such corporation is situated, or has or had its principal office or place of business, or in which such corporation has an office or agent," proceeds to discuss the meaning and scope of the word "situated" in the following portion of the opinion of Judge Minshall, page 351:

"But it is also claimed, that where a city is partly within one and partly within another county, it has a *situs* in each. This we think is not admissible. If this were so, it would be two cities instead of one. It would be quite as consistent with reason to say, that an individual could have two domiciles. The *situs* of a city is to be determined by the place where its principal seat of municipal government is located."

If the municipal corporation, the city of Fostoria, has but one *situs*,

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which is determined by the place where its principal seat of municipal government is located, it would seem under this opinion of the Supreme Court of Ohio, by parity of reason, that a private corporation can likewise have but one *situs*, and that where its principal seat of corporate government and business administration is located, and there is no contention here but that that place is at No. 1 Euclid avenue, Cleveland, Cuyahoga county, Ohio.

Taking this decision of our own Supreme Court, Cleveland, Cuyahoga county, is its *situs* for taxation; is its *situs* for executive management and business administration; it is the *situs* where its directors meet, where its loans and discounts are determined upon; in short, it is the seat of government. The incorporated bank is not at Hudson—it is in Cleveland; Hudson is only a feeder, a tributary of the main reservoir in Cleveland. The purposes of the act are doubtless, first, to provide a safe place for the funds; second, to prevent a brokering of the funds; third, to keep the money within the county for the use and benefit of its citizens until it shall be needed for the purposes of public disbursement.

The court holds that under all the circumstances of this case, especially the last purpose just set forth, the Cleveland Trust Company is not such a banking corporation as is situated in this county within the meaning of this act. Upon the second question, therefore, the court finds the issues with the relator, and the temporary restraining order heretofore granted is made perpetual, and the costs of the action are assessed against the defendants.

CHARITIES—RELIGIOUS SOCIETIES—TRUSTS.

[Hamilton Common Pleas, April 20, 1907.]

STOREY ET AL. V. KNAPP ET AL.

1. CONTRIBUTOR TO RELIGIOUS TRUST FUND AS BENEFICIARY.

Contributors to a religious or charitable trust fund, solicited for the purpose of erecting and maintaining a church and mission school and other institutions in connection thereto, and who become members thereof, are beneficiaries to the extent that they have the right to complain of mismanagement of the property on the part of the trustees.

[For other cases in point, see 2 Cyc. Dig., "Charities," §§ 61-66.—Ed.]

2. A PUBLICATION USED TO BUILD UP A SOCIETY IS PART OF SOCIETY'S PROPERTY.

A religious publication used as a medium for soliciting contributions and donations to a religious sect, to be used in building up and maintaining the organization and necessary buildings and other property thereto, and such publication, designating "God whom we serve" as proprietor, is a part of a general plan for the formation of a religious creed and held in trust for the benefit of the whole organization, and not the individual property of the founder.

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3. COURTS ARE LOTH TO APPOINT RECEIVERS FOR RELIGIOUS SOCIETIES.

Where it is not shown that the trustees of a religious or charitable fund have wilfully misapplied the funds of the trust, but, rather, have displayed a deplorably lax method in management of the affairs of the society, the court will endeavor to effect a reorganization of the management and business methods without appointing a receiver therefor.

[Syllabus approved by the court.]

Roettinger & Gorman and J. W. Curts, for plaintiffs.

J. W. Heintzman, Smith Hickenlooper and Miller Outcalt, for defendants.

PFLEGER, J.

The plaintiff, James Storey, brought this action against the defendants, Mrs. M. W. Knapp, Bessie Standley and Meredith G. Standley, alleging that he is a member in good standing of the religious organization known as the God's Bible School and Missionary Training Home of this city, and that he sues in behalf of himself and all those who are members of, affiliated with, contributors to, and interested in, the work which has heretofore been and is now conducted under the general name of God's Bible School and Missionary Training Home. He says that in the year 1899 one Martin W. Knapp published a religious paper known as the "Revivalist," and about the same time he, together with one Mary Storey, conducted a mission work on Sycamore street, which developed and grew to such proportions that they found it necessary to enlarge their sphere of action and purchased the location on Mount Auburn (now called Mount of Blessings) for \$20,000, took the title in the name of M. W. Knapp, trustee absolute, with power to sell and convey and to appoint his successor.

Plaintiff says that said Knapp entered into possession of said property as trustee for himself and his associates and all others who were then and should thereafter contribute to the support of, and become affiliated with, the work carried on by Knapp for the benefit of those who assisted in disseminating the gospel as planned by said Knapp, Mary Storey and others. That thereafter it became necessary to improve and enlarge said premises, until there was invested more than \$100,000 received from contributions made through the medium of the aforesaid paper known as "God's Revivalist," which has a large circulation throughout the country and by means of which the defendants are constantly soliciting contributions to carry on their said work.

Plaintiff says that there is connected with this work an organization known as the International Apostolic Holiness Union, the members of which are composed of ministers, missionaries and others interested in the work.

Plaintiff also says that there is located upon these premises a printing establishment, a school building where students are taught, a book bindery, a dormitory for the use of students, a rescue home, all of which

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are maintained and supported by contributions solicited and received through said weekly paper.

Plaintiff says that M. W. Knapp died in December, 1901, and that shortly before his death he designated his widow, Mrs. Knapp, Bessie Queen (now Mrs. Standley), and Miss Mary Storey, now deceased, as his successors; that these trustees carried on the work until the death of Mary Storey in March, 1906, when the remaining two trustees appointed the defendant, M. G. Standley, as her successor, and that these three have since maintained and carried on the work, as the plaintiff claims, without authority and contrary to law.

Plaintiff further avers that for more than two years the defendant, Mrs. Knapp, has neglected and failed to perform the duties as a trustee, but has been wholly dominated and influenced by the defendant, Meredith G. Standley and especially his wife, Bessie Standley; that the latter is not a godly woman as she professes to be, and that her influence and conduct has militated against the work, that she has misappropriated funds, maintained her parents' family out of such trust funds, purchasing handsome furniture and an expensive piano; that the trustees retained in their employment one Julia Queen, a sister of Bessie Standley, after said Julia had diverted and misappropriated trust funds, and that the defendant, Meredith Standley, for more than two years last past supported and maintained his mother and her family out of said trust funds and permitted them to live in great luxury.

Plaintiff further alleges that in 1904 the trustees diverted more than \$2,000 contributed to the missionary work in foreign fields; that an annual income of over \$300 for waste paper in the printing establishment was misappropriated by Meredith G. Standley without rendering an account of the same.

Plaintiff claims that irresponsible persons were handling the cash, of which the trustees were aware, and that upon the discovery of these acts and derelictions by the plaintiff as bookkeeper in said establishment they took away his position.

Plaintiff further alleges that the defendants are usurping their authority, are arbitrary in the treatment of those who are associated with them and refuse to call together the members of said organization who sustain and promote its welfare, and that all these facts have become generally known throughout the country, by reason of which a general lack of confidence exists in the ability and integrity of the administration, and that unless action is taken by this court said property is in danger of being frittered away and the work of the institution destroyed.

Plaintiff says that the work if carried on according to the principles of its founder would do much good, but that the defendants are wholly unfit to carry on said work, and that no system has been adopted

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by which this property is to be administered for the benefit of those to whom it belongs, and that the defendants claim to have sole and absolute authority, and allege that they are amenable only to themselves and God.

Plaintiff for himself and others prays that an injunction may be had restraining the defendants from transferring, misappropriating or wasting any of the money or property, that a receiver be appointed and that an order go forth from the court directing that a meeting be called of all the members, contributors and those interested or affiliated with the work to form an organization according to the laws of Ohio; that a board be selected in whom the title of said property, assets and work be vested, and for all other relief in the premises.

Intervening petitions are filed by Charles Eckhart, a contributor of over \$3,000, but who is not a member of the local church; and by John B. Martin, a contributor of about \$2,000, in the same situation; and by William Roettinger, a contributor who claims to be associated in the work and who is a member of the Apostolic Holiness Church.

They say that Martin W. Knapp's purpose in forming this movement was to conduct said missionary work and to promote and practice a high standard of religion, and that owing to the large number of persons who were accustomed to attend the same it was necessary to procure a permanent place; that originally it was contemplated to establish a school to promulgate his religious views and practices and perfect persons as missionaries, but that later on as an outgrowth or development of the main work this bible school was established; that before said school was so organized said Knapp decided that it was necessary to establish a church and have officers appointed who should share with him the responsibility of carrying forward said work, and a local church known as the Apostolic Holiness Church was organized, which was a continuation of his religious services held down town. That contributions were asked for by said Knapp and Miss Storey in their lifetime to purchase the premises for his religious work, and not originally for a bible school, for the benefit of those who desired to unite with them in said service; that it was always understood that the subscribers to the "Revivalist," known as members of the "Revivalist Family," were part and parcel of the organization for whose benefit the property was purchased, and that contributions for the purchase of said real estate were received through said newspaper; that members of said church supported said "Revivalist" and said bible school. The intervening petitioners adopt all the allegations of the plaintiff's petition, claiming that they have an interest in the perpetuation of the trust, and pray for a receiver and for the relief for which the plaintiff prays.

The defendants filed an answer alleging that they were trustees, that they were appointed as indicated in the petition; they deny all fraud-

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ulent or dishonest acts or misappropriations alleged; and claim that they are carrying on the objects and purposes of Martin W. Knapp in accordance with the trust, and deny that the plaintiff and the intervening petitioners are beneficiaries of said trust or have any right to call these defendants to an account. They insist that the main object of the trust is the bible school and missionary training home and that the local church and the apostolic holiness union are separate and merely subsidiary to such main purpose. They pray for a dismissal of the bill.

At the very outset the right of the plaintiff and his associates to bring this action is questioned: (1) The privilege of the coplaintiffs to intervene; and (2) the authority of any and all of them to question the trust

It is not denied that the real estate and personal property of the God's Bible school and Missionary Training Home, the dormitory and tabernacle, the rescue home, the printing office, the camp meeting and buildings erected on the local and foreign missionary fields, are all held in trust. The weekly paper called the "God's Revivalist," the books and copyrights only are claimed to be held by Mrs. Knapp as an individual. The trustees are insisting that the plaintiffs are not the beneficiaries in any sense, that the trust is one for religion and charity over which the trustees have the sole power and control, and that they are answerable only to God.

It would be a great and indeed a useless task to go over each of the many authorities cited by counsel, and only to those which are applicable will reference be made.

Where trusts are created in such a manner as to give to trustees the discretion of naming the beneficiaries, or where the terms of the trust are not so definite as to designate all those entitled to its benefits, much is left to the judgment of the trustees, and when so exercised in good faith courts of equity will not interfere. *Clayton v. Hallett*, 30 Colo. 231 [70 Pac. Rep. 429; 59 L. R. A. 407; 97 Am. St. Rep. 117]; *Trafton v. Black*, 51 N. E. 292; *Dodge v. Williams*, 46 Wis. 70 [50 N. W. Rep. 1103]; *Fairbanks v. Lamson*, 99 Mass. 533. That a court of equity will not generally interfere with the spiritual affairs, the church government or discipline, or the doctrine or mode of worship, as it is one of man's inalienable rights to worship according to the dictates of his own conscience, must be conceded, but there are cases where it has power to and does inquire into the tenets of a church society where the proprietary rights to the place of worship are at issue and where property rights are in danger or are involved. *Beach, Receivers* Sec. 439, p. 480. And it was held in one case that where a religious society becomes incorporated and confers upon its trustees the power to hold and manage the property, it has divested itself of the

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power to hold and manage such property (*Union Baptist Assn. Trustees v. Huhn*, 7 Tex. Civ. App. 249 [26 S. W. Rep. 755]); and that mere contributors of money or property acquire no estate or control over the property and cannot call the trustees to an account, especially where it is merely for charitable purposes. See *Read v. St. Ambrose Church*, 137 Pa. St. 320-327 [20 Atl. Rep. 1002; 11 L. R. A. 727]; *Clark v. Oliver*, 91 Va. 421 [22 S. E. Rep. 175]; *Ludlam v. Higbee*, 11 N. J. (3 Stock.) 342. Where, however, real estate for church purposes is held in trust as a place of worship for persons having a special interest, such as membership in the church organization, the right to maintain an action and enforce the execution of the trust is established (*Strong v. Doty*, 32 Wis. 381, 386; *Ludlam v. Higbee*, *supra*); and all those having a common interest as members of the society may sue for the benefit of others similarly situated. *Nash v. Sutton*, 117 N. C. 231 [23 S. E. Rep. 178]; *Beatty v. Kurtz*, 27 U. S. (2 Pet.) 566-579 [7 L. Ed. 521].

It is unnecessary to go outside of our state in order to establish such a right, for our Supreme Court in *Mannix v. Purcell*, 46 Ohio St. 102 [19 N. E. Rep. 572; 2 L. R. A. 753; 15 Am. St. Rep. 562], has held that a conveyance to one in trust for purposes of public religious worship and other charitable uses is a trust of which the courts will take cognizance and assume control for the purpose of preventing its abuse, perversion or destruction, and that though the several congregations of the churches so held in trust and the persons having charge of such schools and churches are severally unincorporated or otherwise incapable of holding the legal title to the property so used, they nevertheless have such an interest in the trust property as permits them to be represented in court by a number less than the whole having a common interest with them for the purpose of protecting the property from seizure and sale for the satisfaction of the private debts of the trustee; and they say in the syllabus and in the opinion that it is not essential to the existence or enjoyment of a trust for charitable uses that the individual beneficiaries are able to show that they contributed to, or have a personal pecuniary interest in, the trust property.

So that in this case if there were any doubts about the right of plaintiffs, Martin and Eckhart, to intervene, on the ground that they are not members of the local church, they were at least large contributors and followers of the doctrines preached by M. W. Knapp, the founder, and even though they might be eliminated as parties plaintiff on the theory that they are not of the same class as plaintiffs, the petitioners, Storey and William Roettinger, are both contributors and members of the local Apostolic Holiness Church and they would have the right to complain of mismanagement on the part of the trustees, provided of course the church members are the beneficiaries of the main trust as

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created by Martin W. Knapp and that the church is not a separate institution. The local Apostolic Holiness Church is an incorporated body, having succeeded the New Testament Society, its predecessor, a corporation organized under the laws of Ohio. This fact, however, is not material in this controversy.

The right of all those similarly situated to join or have one or more sue for the benefit of all having a common or general interest in the question is particularly granted by Rev. Stat. 5007, 5008 (Lan. 8522, 8523) of the code.

Authorities are also cited by defendants' counsel as tending to establish the sole authority of the attorney-general to bring this action, especially under Rev. Stat. 205 (Lan. 255), which provides that the attorney-general shall cause suits to be instituted to enforce the performance of charitable and educational trusts and restrain the abuse thereof. Irrespective of the question whether this section is limited to specific trusts or to certain conditions, or that the remedy is cumulative, the case of *Mannix v. Purcell, supra*, is, in my judgment, absolutely decisive of the right of church members to sue for the fulfillment of a church trust. And so of the declaration by the trustees that they are not answerable to any human agency, but that their compact is between their conscience and their God. But for their evident sincerity in their beliefs, this could well be denominated sacrilege if not blasphemy, and might tempt the court speedily to wind up such an impious trust.

The numerous religious fads and isms of the present day, alleging some one to be the messenger of God or typifying the second advent of the Nazarene or proclaiming one to be possessed of the attributes of the Savior of men, particularly the power of healing the sick, are such as would easily attract the credulous, the ill, the aged and the poor, who are seeking relief for their bodily afflictions and solace for their souls, and induce them to surrender the savings of their hard-earned toil. These religious hypocrites who extort money from the poor and the unsuspecting are more dangerous than the money gamblers of Wall street. That there may be no misapprehension, I repeat that the court is impressed with the sincerity of these defendants in their mode of worship, and as well with the fact that they have done much good along charitable lines. Their idea of answering to God alone for the faithful discharge of their duties may be excused because of their good faith, but to make it the basis of religious trusts would establish not only a dangerous precedent but would create a shield for screening the kind of hypocrisy just mentioned. Our highest court has, however, answered this question pointedly in *Mannix v. Purcell, supra*, when it said, on page 139:

"The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the court of morals or the forum

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of conscience, is no trust at all; it is an absurdity. The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control, to avert its destruction, perversion or abuse." The plaintiffs further allege that they are also entitled to complain by reason of the fact that they are all subscribers to the paper called "God's Revivalist," in the issues of which Knapp and his successors called such subscribers "members of the Revivalist Family." This would also be immaterial unless it is necessary to ascertain all the beneficiaries of this trust.

Inasmuch, therefore, as some of the plaintiffs have the right to maintain this action, provided they establish evidence sufficient to justify the court's intervention, what are the facts (1) regarding the nature and scope of the trust as originally established by Martin W. Knapp and exemplified by his successors, and (2) if there is such a trust, how many of all these enterprises are included therein? Is the publication known as "God's Revivalist" and the various books and tracts, the property of Martin W. Knapp or his wife, or are they the property of the trustees? A number of articles written by Knapp and published in the "Revivalist" were offered in evidence as reflecting upon his plans and intentions. The "Revivalist," originally a monthly, was published by Knapp and his wife in Michigan before they came to Cincinnati to begin religious work. Whether or not his main object was to establish a bible school and missionary training home and use all the other enterprises as auxiliaries to this object, becomes important in ascertaining the identity of the beneficiaries. Brief reference may, therefore, be made to the expressions of Mr. Knapp in his weekly paper and also of the present trustees after his death, which occurred in December, 1901.

In the issue of June 21, 1900, he advocates the establishment of a school devoted exclusively to religious teachings, this to be in connection with "our work." He states further that the work which God has committed to them takes the following form: (1) The publication of God's paper, the "Revivalist," (2) the publication of pentecostal literature, (3) God's camp meeting, salvation park, and prospectively and by faith, God's Bible School and Missionary Training Home and Orphanage; that for some time they have felt the need of a location where most of this work could be concentrated, as it is now scattered in different places; that they have been examining several locations, one of which would make a very commodious chapel and upon which a church could be built, and which would be adapted to every department of their work. In the dedicatory service he said that they felt that it was God's will that there should be some central point where the work which is committed to them should be located.

On October 11, 1900, he said he wanted a place where the holy gospel might be taught and where people could be saved and sanctified.

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He also desired it as a place to hold camp meetings. In soliciting subscriptions he said, "I hold it not as personal property but for God."

On November 15, 1900, he mentioned the future place as a building for a permanent camp meeting and a tabernacle.

On May 31, 1901, he refers to a location for the tabernacle and published subscriptions to the bible school and the tabernacle fund separately.

On November 14, 1900, he gave the contributors' names under one head as contributors to "God's Bible School and tabernacle fund."

On June 13, 1901, he says, "God's tabernacle is nearing completion where it is expected to greet many of the readers of the Revivalist."

On September 19, 1901, he gave a statement of the receipts for God's Bible School and tabernacle fund and says, "It is a center and supply house of the work of God."

On February 1, 1900, before he started his movement for the purchase of property, the "Revivalist" recited that services were held at the Revivalist chapel on Sycamore street, aided by the members of the Cincinnati Holiness Union and "Prayer League."

On December 26, 1901, after Mr. Knapp's death, Mrs. Knapp published an article soliciting the prayers of the readers of the "Revivalist" in behalf of the bible school, "God's Revivalist," and that all the work connected with it may be fully carried out.

That Mr. Knapp had in mind the spreading of the Gospel according to his own teaching as the main object of his work is also testified to by William Roettinger and J. B. Martin when the work was first started on Sycamore street. The mere fact that the trustees regarded the church as a separate organization and refused to make a formal union with it does not change the situation. There can, therefore, be little doubt about his main desire to build a permanent home for his church work and that the formation of these different enterprises was the outgrowth of one common religious cause or movement and that contributors there-to were so led to believe.

Regarding the ownership of the "Revivalist," Mr. Knapp in the issue of September 21, 1899, designates "God whom we serve" as proprietor, and "M. W. Knapp, editor and publisher." On January 14, 1904, the trustees stated that a fraternal union had been consummated between the Apostolic Holiness Union, "God's Revivalist," the bible school and all the work on the foreign fields, and that "God's Revivalist" is the organ of the union. In the souvenir edition published January, 1905, it recites as part of its history that the Lord led Brother Knapp in 1902 when the paper was sent out from his own home. It said the paper belonged to God and God sent Knapp to push "holiness." Opposite counsel point to the publication of June 21, 1900, in which Mr. Knapp said that God was the owner; they were his books, and it was

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his camp meeting and his bible school, and that this is sustained by a stewardship for God.

Perhaps the most conclusive evidence on the question of ownership is the action taken by Mrs. Knapp in the administration of the individual estate of her husband, M. W. Knapp, in which she and the other trustees make oath that all the funds for subscriptions to the "Revivalist" and for other purposes were not the individual property of Knapp, but belonged to the trustees, and in the inventory no mention is made of the paper or any copyrights. An entry is made by the court at the instance of the widow that Martin W. Knapp left no personal property whatsoever. This is explained by counsel for the trustees on the theory that the object of the entire proceeding was to obtain possession of the moneys in the hands of the Second National Bank, which could not otherwise have been used. But it is a strong declaration against interest, which together with the publications just mentioned and the other evidence satisfies this court that the claim of the individual ownership of Mr. Knapp and subsequently of Mrs. Knapp as sole proprietor is not well founded.

It is obvious to the court, therefore, that the main object of Mr. Knapp was not the mere establishment of a training school and home for missionaries, but that his great work was the promotion of religion and the spreading of the gospel according to his own interpretation which he called "a holiness movement," and that he gathered around him those who had become dissatisfied with their church ties, and that to better carry out these objects he deemed it wise as an incident to his theological doctrines to establish this bible school and training home and all the other enterprises already mentioned; that the paper called "God's Revivalist" by virtue of the uses to which it was put and by the expressions of Knapp and his successors was part and parcel of his general plan of organizing a religious following, to which all the other establishments, including the printing of this paper as well as the paper called the "Sparkling Waters" became merely ancillary.

Having passed upon the right of the plaintiff and the intervenors to commence this action as beneficiaries of the trust, and having shown that the trust applies to all the real and personal property, the publications and the other enterprises, let us examine into the complaint regarding the legality of appointment and fitness of the trustees and the alleged diversion and mismanagement of the trust property.

A number of minor incidents were related in the evidence which in my judgment are so unimportant as to have no bearing upon the broad claim of mismanagement, and we may dismiss from consideration the charge that Mr. and Mrs. Standley had supported and maintained their respective families and kindred out of the funds of the institution in the purchase of luxuries, furniture and an expensive piano and that the

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Standleys, while professing self-denial, themselves, lived in great luxury; for none of these were proven.

It is alleged that Meredith Standley, one of the trustees, received the proceeds of the sale of waste paper from the printing office, which exceeded in value \$300 per year, and for which he did not account. He does not deny that he received this money and says that the other trustees empowered him to take it and pay for an obligation incurred years ago to pay his tuition in college, that he refrained from doing this and devoted the money not to his own personal use but to the distribution of free will offerings as they were called; that is to say, additional recompense to those who were unusually industrious in their labors or who deserved recognition because of some general or special work performed outside of the scope of their regular duties. I believe Mr. Standley to have been truthful in his statement and will take his word for it. Indeed, there is no other testimony to contradict it. Malfeasance, if any existed by reason of this occurrence, is shown merely in the fact that he did not permit the transaction to appear in the books of the concern.

Another transaction complained of by the plaintiff was one in which Meredith Standley had first taken \$100 to pay the weekly pay roll of the printing office of which he had charge, and immediately thereafter took an additional \$26 as he claims for the payment of overtime put in by the employes. James Storey, the plaintiff, was the bookkeeper at the time, and asked the foreman for the amount paid employes in the printing office for that week, and this foreman said that it amounted to only \$93 including the overtime. Storey confronted Mr. and Mrs. Standley with the alleged discrepancy, but the explanation was unsatisfactory to him and friction arose. There is no evidence except the accusation made by Storey and the alleged explanation given by Standley. As in the other charge, I am compelled and do accept the statement of Mr. Standley as truthful, and criticise only the method of keeping the cash account.

A bitter contention arose over the item of two dollars which the plaintiff claims was never accounted for. Julia Queen, the sister of Mrs. Standley, had charge of the cash box which it is alleged she carried around with her. She withdrew ten dollars from the box and handed the bookkeeper a slip for the payment of a bill of eight dollars due to a man named Smith. The bookkeeper claimed that the difference of two dollars could not be accounted for and that the cash would not balance unless another charge were made or the two dollars replaced in the treasury. It is admitted that Mr. Storey complained to Mrs. Standley and the trustees, but they insist that their attention was not attracted to the transaction until considerable time had elapsed, and that inasmuch as the cash actually balanced, the difference of two dollars

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must have been returned to the cash box. It is charged that Mrs. Standley made statements that this additional sum was used for some legitimate purpose, and that she took offense at the persistence of Mr. Storey in having the books correctly kept, which he says resulted in his dismissal—he receiving but one hundred dollars as a free will offering for many months' services. In this charge, as in the others, the proof is not sufficient to establish an act of misappropriation. As the book-keeper did not have charge of the cash, it was not shown that the cash was short or that that amount was really misappropriated. It may, however, be added to the list of items indicating lax business methods.

One of the most important claims of the plaintiff was the alleged misappropriation or diversion in 1904 of a fund of \$2,965. This amount, together with other sums, amounting to probably \$5,000 or \$6,000, was taken out of what was known as the world-wide mission fund. All of it was returned excepting this sum of \$2,965 which was used to pay obligations on the Beulah Heights farm in Kentucky, the missions at Mount Washington and in Shantytown and in the publication of tracts for home missions. In order to balance this world-wide fund account, it was charged off to the accounts mentioned.

The trustees do not deny that this was done, and in explanation say that at this time they were confronted by a financial crisis in which the funds to which this sum was charged fell short of the requirements, and that Miss Mary Storey, one of the former trustees, a sister of the plaintiff and one who it is said by both sides was a woman of integrity and of godliness, advised this action on the ground that the expression "world-wide" meant missions in the local as well as in the foreign field, although it was conceded that there was both a foreign and a local fund devoted to missions. Mrs. Knapp says that it was done without her knowledge and that when Mary Storey said she had consulted the Almighty and He had revealed to her the righteousness of the move, she believed in the wisdom of it. Mrs. Standley claimed that it was necessary that this be done, and that she accepted the interpretation of Mary Storey that this fund could be used for the local field. It was therefore not a misappropriation, but a diversion of one fund to another. If there was a financial crisis impending, the action of the trustees might have been justified under the circumstances, but the moneys which were taken should at least have been replaced or returned to the fund from which they were taken, because the trustees subsequently believed that the world-wide mission fund should be devoted exclusively to the foreign field.

With the exception of the items mentioned, there is no evidence tending to establish misappropriation of funds by any of the trustees, unless it could be claimed to be so from the evidence of two other witnesses, namely: Mrs. Olson, a very conscientious young woman, who

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testified that the explanations given to her by Mrs. Standley as to where certain payments should be charged, were not always satisfactory, that occasionally there were small discrepancies in the cash deposits in bank, and that when she expressed some doubt about the propriety of charging certain items to the accounts as proposed by Mrs. Standley, the latter responded that it was all right as long as God knew what they were doing with it; and Mrs. Coates, the other witness, who testified that a number of letters were received in one week complaining that contributions sent had not been acknowledged shows another alleged act of malfeasance. The trustees aver their utmost good faith in dealing with all these questions and say that all money was devoted to the cause as founded by M. W. Knapp. The court is inclined to believe these statements.

The lax mode adopted by the trustees to carry on this immense undertaking and the so-called system of bookkeeping were both deplorable. No ledger accounts of the purchase of paper for printing their books and papers, amounting to over \$12,000 a year, were opened; the accounts appeared in summaries of cash and were kept on paper files and then stored away, and this was true of almost all of the purchases for the home account, such as food supplies, ice, coal, dry goods, etc., although these amounted to over \$1,600 per month.

Complaint was also made that some of their missionaries were not regularly or properly taken care of in the way of remittances to sustain themselves in their work on the foreign field. To this the trustees answered showing a number of remittances to the superintendent of that field, but which the missionaries claim they did not receive.

Another complaint is, that they failed to furnish their students and teachers with sufficient wholesome food to sustain them, while the trustees fared much better. This is positively denied by the trustees, who say that their table contained exactly the same food and that only occasionally was a delicacy sent to them by friends. It is evident from the admissions, however, of all of the parties that the food actually furnished was inadequate, and that there is room for improvement in that respect as well.

These then are in substance the charges of alleged misappropriation and mismanagement. Considerable evidence was also submitted touching the personal qualifications of the three trustees. Without going over the testimony, the court is of the opinion that all the trustees, including Mrs. Standley, are honest and godly people; that they are sincere in their religious beliefs, and that they have attempted in good faith to carry out the principles of the founder, M. W. Knapp. Nor does the court doubt that Mrs. Knapp is a devout woman and deeply interested in this work. That she has not taken a leading part is due mainly to her recent illness and because Mrs. Standley has taken the burden of the work.

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Mrs. Knapp's plan of determining important questions by prayer and revelations from God and her determination to listen to neither counsel nor court in the amicable adjustment of this matter, is not indicative of a very safe administration of the business affairs of the institution, nor is it conducive to the best interests of the trust.

The court has no doubt of the sincerity and good faith of Meredith G. Standley in the work which he has performed.

The reflections are mainly cast upon Mrs. Bessie Standley. She is alleged to be hypocritical, untruthful, careless in the management of the trust and domineering in her conduct towards the other trustees and employes of God's Bible School. It is possible that she was domineering in her conduct to some and at times severe and radical in the handling and dismissal of employes and in the settlement of important questions. But whether she was justified in taking such radical measures the court is unable to say. That she was hypocritical and purposely untruthful the court does not for a moment believe. She denies that she made a confession at a camp meeting where it was alleged she conceded a falsehood regarding her former social position. If true it would not merit dismissal. It is plain, however, that she has taken the leading part in the trust, and that she has controlled both Mrs. Knapp and her husband on questions of policy and business. That this was done without reference to the welfare of the institution I cannot and will not believe. She is practically the head and brains of the institution because of her intimate and practical knowledge of its affairs and indeed of every detail.

Let us examine for a moment the law applicable to the removal of trustees and the appointment of receivers.

That receivers will be appointed where there has been a fraudulent or improvident execution of the trust or a misapplication of the funds or mismanagement or abuse of the trust, or where there is an incapacity on the part of a trustee, has been established by many authorities. Beach, *Trusts & Trustees* Sec. 688; Beach, *Receivers* Sec. 90, p. 102; Sec. 439, p. 480. But inasmuch as the appointment of a receiver is one of the most drastic measures known to the law, courts act with great hesitancy and only resort to such relief when all other measures fail or prove inefficient, and where it is plain that the demand is imperative. Beach, *Trusts & Trustees* Sec. 288, note 1; *Willis v. Corlies*, 2 Edw. Ch. 281. And equity will not displace a trustee and place the estate in the hands of a receiver unless the trustee wilfully or ignorantly permits the property to be placed in a position of insecurity which might have been prevented by due care. High, *Receivers* Sec. 693. Nor will the court supersede or remove a trustee on the ground of an honest mistake or a misjudgment; nor even of acts of imprudence and neglect, except only to compel him to make good the injury resulting therefrom. *Preston v.*

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Wilcox, 38 Mich. 578, 579-582; *Durfee, In re*, 4 R. I. 401; 2 Story, Eq. Jurisp. 1289.

The court is not inclined to appoint a receiver of all these properties at the present time, because it would mean a total destruction of all its objects and purposes. Its supporters would lose confidence and would cause them to withdraw their support for its maintenance. Much good has been done in the past by Martin W. Knapp and the trustees, especially in assisting the poor and the needy and much good could be done in the future if the intentions of its founder were faithfully and properly carried out. Its spiritual doctrines, its religious faith and mode of worship, if kept within the reasonable limits intended by Mr. Knapp, and free from any fanaticism, may be carried on by the trustees, and the courts will not interfere with their calls upon the Deity for revelations for their guidance, but to permit their temporalities, their business and property affairs to be governed upon the same theory and allow them to decide all important business questions by thoughts and biblical quotations and verses which they imagine God puts into their minds in answer to any interrogatory they may ask, and to tolerate the lax business method and the style of bookkeeping which has existed for so many years, would lead at least to temporal, if not to spiritual, suicide.

And this brings us to the last question involved, namely, What is the legal status of the appointment of the three trustees? God's Bible School was conveyed to Martin W. Knapp and his successor with power to appoint his own successor, but no such authority was given to the latter. The conveyance of other properties to the present trustees was made to them and their successors. On November 1, 1901, shortly before his death, Knapp appointed his wife, Mrs. Knapp, Bessie Queen (now Mrs. Standley) and Miss Mary Storey as his successors by an instrument in writing, not witnessed or acknowledged. Before Mary Storey's death, she verbally requested the appointment of Meredith G. Standley to take her place after her death, and this was verbally acquiesced in by Mrs. Standley and Mrs. Knapp.

In *Warburton v. Sandis*, 14 Sim. 622-631, it was held that where the power to appoint a successor as trustee was not exercised by a legal transfer of the real property, such trustee was not properly appointed.

And where real estate is conveyed to a trustee and his successor with no specific power to appoint such successor, such power cannot be legally exercised by the grantee. *Wilson v. Towle*, 36 N. H. 129; *Thompson v. Hale*, 123 Ga. 305 [51 S. E. Rep. 383].

In *Clark v. Wilson*, 53 Miss. 119, it was held that there is no inherent right in a trustee to appoint his successor, and where a vacancy occurs it can only be filled by a court of chancery.

It would seem, therefore, that this court has under these circum-

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stances ample power to set aside the appointment of his successors as made by Martin W. Knapp, because of its informality and would be justified in declaring the subsequent oral substitution of M. G. Standley for Miss Mary Storey as wholly void.

The case at bar, therefore, bears many of the same legal complications and aspects of the case of *Holmes v. Dowie*, 148 Fed. Rep. 634. Dowie founded a church known as the Christian Catholic Apostolic Church, using funds contributed by his followers and sympathizers, but purchased the land in his own name. He built a tabernacle and established various industrial enterprises conducted by unincorporated companies, stock in which was purchased by his followers at his instance. He constituted himself general overseer and took charge of all its affairs. Dowie subsequently claimed all the property in his own right, although on many occasions he declared, as did Knapp and his followers, that he held the property for God and humanity; he said that Zion's business was God's business. So in the present case the trustees declared in a publication of "God's Revivalist" that it was God's paper, and now say that it belongs to Mrs. Knapp individually.

The claim was made in the Dowie case as it was in this, that Dowie's institutions were all unincorporated, but Judge Landis said the relationship would not be changed even had they been incorporated and that money or property contributed by his followers to found a church cannot be claimed by him as his individual property, but that it is impressed with a trust which binds him as trustee to use it for such purposes, and such trust may be enforced in equity. In that case as in this there were unincorporated associations and institutions, a newspaper called "The Leaves of Healing," which was ordered by the court to be suspended except that an issue be printed announcing a plan for an election of a successor under the supervision of the court, under which all suspended members of the church adhering to the Dowie faction and all other members who have resided in the colony from a given date were permitted to vote. This solution of an intricate problem by Judge Landis was a most admirable one, and this court has concluded to adopt its salient points.

Summarizing its findings the court is of the opinion that all the real and personal property acquired by Knapp and his successors, including the publication known as "God's Revivalist," the books and copyrights belong to this holiness cause or movement; that no receiver be appointed for the present; that the publication of the "God's Revivalist" and the "Sparkling Waters" be not suspended, but continued as heretofore; that Mrs. Knapp, Mrs. Standley and Meredith G. Standley be reappointed by the court as trustees, together with another ancillary trustee to be named by the court, to hold their appointment until the coming Christmas convention, on a day to be fixed, when three trustees

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are to be chosen, and that all members of the local Apostolic Holiness Church, all the missionaries graduated from the school, and all employes, teachers and students over the age of twenty-one years who will subscribe to the doctrine and principles of Martin W. Knapp or a ritual embodying the same (excepting the subscribers as such of "God's Revivalist" and the "Sparkling Waters") be permitted, if personally present, to vote under the Australian ballot system, the further practical details of which may be suggested by counsel; one trustee to be elected for three years, one for two and another for one year, and thereafter annually there shall be elected only one trustee for three years—the fourth trustee temporarily appointed by the court to have supervision of the business management, the cash and the books of account and to assist in establishing a proper and modern system of accounting; the other trustees and the immediate members of their families, as now constituted, to remain in the home as heretofore, unless there is a change in the trusteeship.

This case is to be continued for final entry and for the discharge of the fourth trustee appointed by the court.

Decree accordingly.

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INCORPORATION OF VILLAGE.

[Butler Common Pleas, November 28, 1906.]

*JOHN SCHORR ET AL. V. JOHN C. BRAUN, RECORDER.

1. SUFFICIENCY OF PETITION FOR CREATION OF VILLAGE.

The map which accompanies a petition for the incorporation of a village, whether filed with the county commissioners or township trustees, complies with the requirements of the statute if it accurately exhibits the territory affected and the lines bounding and dividing the properties therein, notwithstanding it does not show that the entire territory has been platted into lots.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporation," §§ 11-18.—Ed.]

2. PETITION FOR CREATION OF VILLAGE FILED BEFORE COUNTY COMMISSIONERS.

If the county commissioners have power to act upon such a petition, the township trustees are without power; and when a portion of the territory included within the proposed corporation has theretofore been platted, its incorporation must be effected by the county commissioners under the provisions of Rev. Stat. 1553 [Lan. 3028], and action by township trustees in that behalf is without authority and void.

[Syllabus approved by the court.]

W. C. Shepherd, for plaintiffs.

E. H. Jones and Homer Gard, for defendants.

KYLE, J.

A petition was filed with the trustees of Fairfield township, Butler county, signed by 104 persons, asking that certain territory become an incorporated village under the name of the village of Lindenwald. It is conceded by counsel for plaintiffs that the petitioners were electors within the territory described and that a majority of them are freeholders.

The territory described in the petition comprises a large number of subdivisions that had been platted into lots, and the plats acknowledged and recorded in the recorder's office of Butler county, long prior to the filing of such petition with the trustees. In addition to such subdivisions there was included within the territory described in the petition, and adjacent thereto, a large number of tracts of land, ranging in size from a fraction of an acre to about twenty acres. The entire territory described in the petition was approximately about 1,000 acres. The acreage in the tracts of land not platted amounted to approximately ninety acres.

The petition contained all the requirements of Rev. Stat. 1555 (Lan. 3030; B. 1536-8) and a request of the petitioners that an election be held as provided in Rev. Stat. 1561a (Lan. 3037; B. 1536-15). Such petition was accompanied by a map of the territory which ac-

*Affirmed by the circuit court, without report, December 15, 1906.

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curately and correctly set forth all the subdivisions theretofore platted and recorded, and the several acreage tracts included in said territory.

There is no contention but that the steps taken by the trustees under Rev. Stat. 1561b, 1561c (Lan. 3038, 3039; B. 1536-16, 1536-17) were in accordance with the provisions of such sections, and that an election was duly had, at which election a majority of the ballots cast were in favor of the incorporation, and that the acts and records of the trustees were duly certified and transmitted to the county recorder of Butler county for record within the time prescribed under Rev. Stat. 1561c (Lan. 3039; B. 1535-17).

The plaintiffs, two electors within such territory, filed their petition in this action to enjoin the recorder from recording such act, or certifying the same to the secretary of state, and if the same had been done, praying for mandatory injunction and order directing such recorder to cancel said record and proceedings. Two principal grounds are relied on by the plaintiffs:

First. Because the trustees were without jurisdiction and power to act.

Second. Because the petition was not accompanied by an accurate map, and that said map was inaccurate, indefinite and erroneous, and failed to set out that the acreage tracts were divided into inlots.

The granting an injunction is the issuance of an extraordinary writ, and there is no evidence or facts before the court to warrant a finding, if the proceedings were otherwise regular and proper, that the granting of the prayer of the petition for the establishment of a village within the territory would be either unjust or inequitable.

The claim is made by the plaintiffs that the map was inaccurate because the entire tract included in the territory described in the petition of the petitioners for the incorporation was not laid out in inlots. Such a claim should rather be, that the map was insufficient. The requirement of the statute is, that the petition should be accompanied by "an accurate map of the territory." This is all that is required, whether a petition be presented to the commissioners or the trustees. There is no dispute but that the map accompanying the petition in this case was accurate and set forth all the established lines within the territory. The plaintiffs in their argument assume that the map required to accompany a petition for incorporation must show that the entire tract within the territory was platted off into lots. Under the language of the statute, which only requires an accurate map of the territory, the one filed herein being admitted to be accurate, and setting forth all the lines and divisions of the properties therein, is sufficient.

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The only remaining question is: Had the trustees the jurisdiction and power to act?

Under Rev. Stat. 1553 (Lan. 3028; B. 1536-6): First, the inhabitants of any territory laid off into a village or hamlet lots and platted, all of which territory has been acknowledged and recorded as is provided with respect to deeds; second, the inhabitants of any territory which has been laid off into city lots and surveyed and platted by the engineer or surveyor, who certifies thereon under oath to its correctness, and which is recorded as is provided with respect to deeds; third, and the inhabitants of any island or adjacent islands, or a part thereof, or all such island or islands, or a part thereof and adjacent territory may obtain the organization of a village or hamlet in the manner provided in this title. Such application shall be signed by not less than thirty electors residing within the proposed corporation limits, and addressed to the county commissioners.

Under Rev. Stat. 1555 (Lan. 3030; B. 1536-8), the petition shall contain the following matters:

First. An accurate description of the territory embraced within the proposed incorporation, and it may contain adjacent territory not laid off into lots.

Second. The supposed number of inhabitants residing in the proposed corporation.

Third. Whether the corporation desired is a village or hamlet.

Fourth. The name proposed.

Fifth. The name of some person to act as agent for the petitioners, and more than one agent may be named therein.

On the filing of such petition the commissioners give due notice, and if the commissioners find that the petition contains all the matters required, and that its statements are true, they shall cause an order to be entered on their journal to the effect that the corporation be organized, which proceeding shall be duly certified by the recorder for record as provided by law.

The petition in this case was filed under Rev. Stat. 1561a (Lan. 3037; B. 1536-15) with the township trustees and proceeded with under Rev. Stat. 1561a, 1561b, 1561c (Lan. 3037, 3038, 3039; B. 1536-15, 1536-16, 1536-17) of such section. Under Rev. Stat. 1561a (Lan. 3037; B. 1536-15) when the inhabitants of any territory or any portion thereof desire that such territory shall be incorporated into a village or hamlet they shall make application to the trustees of the township in which the territory is located, by a petition signed by at least thirty electors thereof, a majority of whom should be freeholders.

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and the petition shall contain the request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation.

And the question here directly presented is: Is there any line of distinction to be drawn between the cases which may be brought before the county commissioners and the township trustees for incorporation of villages? A petition may be filed by not less than thirty electors, residing within the proposed corporate limits with the county commissioners. A petition filed with the trustees shall contain all the requirements of the petition before the commissioners (Rev. Stat. 1555; Lan. 3030; B. 1536-8), and further requires that a majority of petitioners shall be freeholders, and also a request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation. In a proceeding before the county commissioners, the county commissioners become a tribunal or court to hear the petition and determine whether or not the prayer of the petition shall be granted. In a proceeding before the trustees, the trustees themselves do not determine, but hold an election, and the electors within the prescribed territory determine whether or not there shall be an incorporation. When the findings and papers have been certified by the commissioners to the recorder, he cannot record the same for a period of sixty days. In a case before the trustees, when their findings and the papers have been filed with the recorder, he shall forthwith make a record and the corporation becomes established a village, unless a suit be instituted within ten days from the filing of the papers with the recorder.

Under the law as it now stands the commissioners are without authority or power to establish a village, unless prior to the filing of such petition all, or a part of, the territory has been platted and acknowledged and recorded or laid off into lots by an engineer, or the proceeding affects an island. The claim is made by the defendants that the trustees may establish a village from any territory, whether laid out into lots or not.

The only decision upon the question involved in this branch of the case is the case of *Hall v. Siegrist*, 13 Dec. 46, and in that case the point involved herein is directly determined. Judge Neff in that case held:

"Section 1561a [Lan. 3037; B. 1536-15], Rev. Stat. *et seq.* (92 O. L. 333), entitled, 'To permit the incorporation of territory within a township,' has reference to the organization and incorporation of a new class of territory within a township, not embraced within Sec. 1553 [Lan. 3028], Rev. Stat. *et seq.*, providing for the creation of villages and hamlets."

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Without reviewing the authorities referred to, I will follow that decision, as it appears to be the only view that gives full effect to all the sections.

In this case it is admitted that the greater portion of the territory included in the incorporation had long before been platted. This case is thus brought within one of those provided for before the county commissioners, and that, too, whether the territory included only one or a number of plats. If the county commissioners had power to act, the trustees were without power, and holding these views, I find that the proceedings of the trustees and all their acts under the petition for incorporation are without authority and invalid, and that the record of the proceedings by the recorder should be canceled and set aside, and held for naught, and that an order may be issued accordingly. The costs will be adjudged against the agents named.

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CORPORATIONS.

[Montgomery Common Pleas, 1907.]

*LEE MITCHELL V. BOOKWALTER WHEEL CO.

DIVIDEND DECLARED BY BOARD OF DIRECTORS IS A DEBT OF THE CORPORATION.

Under the law of Ohio, the board of directors of a corporation organized for profit conduct, control and exercise the business and powers of the corporation. Hence, when, in the exercise of such powers a dividend is legally declared, it becomes a debt of the corporation to the stockholder as an individual, to be paid within a reasonable time, and as such debt is beyond the control of both the stockholders and directors. Whether or not the directors acted within the scope of their powers in such declaration of dividend is a question for a court to determine in a proper case.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 745-751.—Ed.]
[Syllabus by the court.]

In this case the jury was waived, and it was by consent of all parties, heard by the court. Plaintiff's petition states that the defendant is an Ohio corporation for profit, with a paid-up capital stock of \$75,000; that on September 8, plaintiff was the owner and holder of ninety shares of \$100 each, and that on said date defendant declared a dividend of 40 per cent whereby plaintiff was entitled to receive the sum of \$3,600; that of that amount he has been paid \$3,000, and that there yet remains due him unpaid \$600 which defendant refuses to pay, and he asks judgment in that amount with interest from January 19, 1903.

Defendant by amended answer admits its incorporation, the ownership by plaintiff of the number of shares claimed of the value alleged; that plaintiff was paid \$3,000; that he has demanded \$600 and been refused, and denies each and every other allegation in the petition.

As a second defense, defendant denies that there was a meeting of the board of directors on September 8, 1902; denies the declaration of the dividend, and says further that if there was a dividend of 40 per cent lawfully declared, it was understood and agreed, and was a condition of the declaration, that only 33 1-3 per cent of the same should be paid until there should be further action of the board of directors, providing for the payment of the other 6 2-3 per cent, such action to be at such future time as the board could find said sum could be paid without embarrassing the corporation; that said time had not arrived when the suit was brought; that the board had so declared, which action of the board was approved by the stockholders, who also declared it was not prudent to pay the additional dividend. Plaintiff has received the same dividend as all of the stockholders.

By way of amendment to the answer, the defendant further says that there was an alleged meeting of the board of directors of the de-

*Affirmed, without report, by the circuit court; *Bookwalter Wheel Co. v. Mitchell*, 52 Bull. 67; 75 O. S. 000.

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defendant company on September 8, 1902, at which time there was an attempt made by certain directors, of which the plaintiff was one, to declare a dividend of 40 per cent upon the paid-up capital stock of the said company; that the plaintiff, who was then secretary, called the said meeting, knowing that the president of the company was absent from the county and state, although he well knew he would return in time for a meeting at the same time the meeting for a declaration of dividend was held the year before; that the president was not notified in any manner whatsoever of said meeting; neither did the secretary make any attempt to notify him, although the meeting was called as a special meeting—the day of the regular meeting in said month being on September 2; and the said secretary called said meeting for the sole purpose of receiving the inventory of the property and effects of said corporation; that if said meeting had been lawfully convened, that was the only business which could have been properly transacted.

The defendant denies that there was any power in the alleged meeting to declare a dividend of any kind; that prior to this time and while plaintiff and one W. A. Mays were directors in this company, and the plaintiff was its secretary and manager, receiving a large salary for what should have been honest and faithful service, the said parties entered into a conspiracy with another stockholder, N. J. Catrow, to depreciate the property of the company, allowed the machinery to run down, the stock to be reduced, failed to renew contracts for stock, and otherwise impaired the value of the plant in order to make a showing of large earnings and cripple the plant for further use; that C. L. Bookwalter, who made the resolution for the declaration of the dividend at the meeting of the board, was induced thereto by the wrongful and fraudulent conduct of the plaintiff and Mays, and that it was only because plaintiff and Mays deceived Bookwalter and the other directors by representing that the financial condition warranted a dividend, that the Bookwalters did not oppose a dividend of 40 per cent or any other dividend at the time in excess of 25 per cent, as the financial condition of the company did not justify in excess of that amount.

Defendant further says that the minutes of the meeting were never approved by the board, and that the directors subsequently voted to rescind the action of the board in declaring a dividend, and that the stockholders duly assembled duly approved the action of the board in rescinding the dividend; that the plaintiff was unfaithful to his trust as an officer because he had already planned in connection with said Mays and Catrow, to establish a competing wheel company (and afterwards did establish such company), in the same city, to wit: Miamisburg, where the defendant company is situated, and used his position as an officer of the company to leave it in a condition, if possible, where it could not continue its business successfully.

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For reply, the plaintiff avers that there was a meeting of the board of directors of the defendant company on September 8, 1902, and that a dividend of 40 per cent was declared by said board at this meeting on said date, and denies each and every other allegation in the second defense of the answer contained.

Plaintiff further says that whatever alleged action, if any, was taken by the board of directors of defendant company after September 8, 1902, in reference to the time of payment or in any way affecting the payment of the unpaid balance of 6 2-3 per cent of said dividend, or otherwise, was taken and done without the consent or approval of the plaintiff, and that the alleged subsequent action of the stockholders approving the said alleged action of the board of directors was taken long after the filing of the petition herein, to wit: March 20, 1903, and that whatever action, if any, was taken at said alleged meeting of the stockholders in reference to the payment of or in any way affecting said dividend or the unpaid balance of 6 2-3 per cent thereof, or in approving the said alleged action of said board, was taken and done without the consent or approval of this plaintiff. Plaintiff further says that he never received any notice of the object and purpose of said meeting of stockholders on March 20, 1903, or of the business to be transacted thereat.

Wherefore, plaintiff asks judgment as prayed for in his petition.

For a reply to the amendment to the amended answer, plaintiff says, after averring as to the declaration of the dividend and the meeting of the board of directors, that at that date he was secretary of the company and called the meeting. He admits that he knew the president of the company was absent from the county and state, but avers that he did not know his address or suppose his presence necessary, and admits that September 8, 1902, was the regular meeting of the board of directors, and denies each and every other allegation in the amendment to the amended answer contained.

The testimony in this case shows that the Bookwalter Wheel Company, is an Ohio corporation with a paid-up capital stock of \$75,000; that on September 8, 1902, it had a directorate composed of five members, William Gamble, William A. Mays, Charles L. Bookwalter, W. L. Bookwalter and Lee Mitchell—William Gamble being president, and Lee Mitchell the plaintiff, secretary and treasurer; that on September 2, 1902, such board of directors met at the office of the company in Miamisburg, Ohio, the minutes of which meeting are as follows:

“Miamisburg, Ohio, September 2, 1902, board called to order by V. P. Bookwalter. Minutes of last meeting read and approved. Secretary reported inventory under way but not completed. Signed Lee Mitchell, Secretary, W. S. Bookwalter, V. P. Present, W. S. Bookwalter, C. L. Bookwalter, Lee Mitchell.

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This meeting was pursuant to Sec. 5 of the by-laws of the company which reads as follows:

"It shall be the duty of the board of directors to meet the first Tuesday of each month to transact such business as may come before it. A majority of said board shall constitute a quorum to transact business. Special meetings may be called by president or secretary at any time."

The testimony further shows that the end of the company's fiscal year was August 31, and that it had been the custom of the company to have an inventory taken during the latter part of August of each year and to have report of the same made at the September meeting of the board, and thereupon to declare such dividend as the condition of the company seemed to warrant.

The dividend for 1896 having been declared on September 21; for 1897, September 4; for 1898, September 6; for 1899, September 8; for September 1900, September 10; for 1901, September 21.

The testimony further shows that subsequent to the meeting of September 2, 1902, the board held another meeting on September 8, 1902. The minutes of which are as follows:

"Miamisburg, September 8, 1902. Board of directors met at the call of the secretary for the purpose of making report of inventory taken September 1, V. P. Bookwalter presiding. Present, W. A. Mays, Dr. Bookwalter, C. L. Bookwalter, and Lee Mitchell. A summary statement of the condition of the company was read, a copy of which will be found on the following page. On motion of C. L. Bookwalter and second by W. A. Mays a dividend of 40 per cent was declared upon the capital stock paid in, making \$30,000. The treasurer stated it would not be convenient to pay in full at once but to pay 33 1-3 per cent now and 6 2-3 per cent later. No further business coming before the board, it adjourned. W. S. Bookwalter, V. P., Lee Mitchell, secretary."

The following is the summary statement referred to:

"Summary statement after taking inventory September 1, 1902. Assets: Real estate, \$15,500.42; machinery, 15,525; team, 150; cash in bank and on hand, 21,946.28; insurance prepaid, 432.80; bills receivable, 9,619.28; personal accounts receivable, 12,672.73; tire, tirebolts, etc., 4,018.58; flanges, rivets, etc., 5,855.80; supplies, 558.70; merchandise on hand, 33,890.72; total, \$120,170.31. Liabilities: capital stock, \$75,000; surplus fund, 13,787.85; total, \$88,787.85. The net earnings for the year, \$31,382.46."

This, it will be noticed, shows no bills payable.

The testimony further shows that after said meeting of September 8, checks were mailed by the secretary of that date for 33 1-3 per cent of the dividend, and that accompanying letters read as follows:

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"At a meeting of the board of directors held this day a dividend of 40 per cent was declared upon the paid-up capital stock. We enclose check to your order for 33 1-3 per cent of this, balance of 6 2-3 per cent will be paid later. Respectfully, The Bookwalter Wheel Co., per Lee Mitchell, secretary and treasurer."

The plaintiff in this case was on said date a stockholder owning ninety shares and would be entitled under such a dividend legally declared to \$3,600. He did receive \$3,000 but the \$600 is still unpaid.

The testimony further shows that on page 106 of the company's ledger this plaintiff was on September 8, 1902, credited with \$3,600, and that the surplus fund in the ledger was charged with the same amount. Similar entries were made as to the dividend of each stockholder.

The testimony further shows that William Gamble who was the president of the company was absent from both the meeting of September 2, and September 8; that at that time of the year it was his custom to be in New Hampshire, or at least out of this state, where he went because of hay fever with which he is afflicted.

Mr. Mitchell testified that he notified the other members of the board personally of the meeting of September 8, but not knowing Mr. Gamble's address and not considering it necessary, he had not mailed him a notice.

The testimony further shows that the following dividends have been declared by this company: 1899, on net earnings, \$26,299.70, 25 per cent, 12 1-2 being paid September 8, and 12 1-2 paid September 25; 1900, on net earnings of \$26,290.24, 33 1-3 per cent paid in September 21; 1901, on net earnings \$26,180.28, 33 1-3 per cent; 1902, on net earnings of \$31,382.46, 40 per cent, and that William Gamble was president in the year 1901 only, and that said dividends were paid without any complaint heretofore because of his absence.

The testimony further shows that regular and called meetings of the board of directors were afterwards held in 1902, on September 24 (when the resignation of Mr. Mitchell, the secretary and treasurer, was accepted, to take effect October 1)—on October 1, October 27, 1902, January 6, 1903, and on the last-mentioned date the minutes are as follows:

"Dr. W. S. Bookwalter offered the following: Whereas at a meeting of the board of directors held in September 8, 1902, a motion was adopted declaring a dividend of 40 per cent upon the capital stock paid in, 33 1-3 per cent of which be paid at once and 6 2-3 per cent paid later when it would be convenient to pay it, resolved that the board of directors rescind their action taken on above date as to the payment of the 6 2-3 per cent and that the action of the board as to such 6 2-3 per cent be hereby declared null and void for the reason that there are necessary repairs to be made to the plant of the company and the installation of automatic sprinkler equipment and other good reasons why

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such 62-3 per cent dividend cannot be paid. A vote was taken unanimously adopting this resolution."

The minutes of the corporation further show that pursuant to the regulations and the by-laws, and notice, the annual stockholders' meeting was held at the office of the company on January 19, 1903, at which no action was taken relative to this dividend; that afterwards, and after this suit had been brought in January, on March 20, 1903, another stockholders' meeting was held, at which the following resolution was offered by Dr. Bookwalter:

"Whereas, at an alleged meeting of the board of directors of this corporation, held on September 8, 1902, there was an attempt made to declare a dividend of 40 per cent upon the paid capital stock of this corporation, and whereas said attempt was made because the stockholders then present were misled by the then secretary and manager of said corporation for the fiscal year then closing, and whereas, said alleged meeting of directors of this corporation was unlawfully convened and said dividend not legally declared, and whereas the same dividend, to wit 33 1-3 per cent, has been paid to all the stockholders and no more to any, therefore, be it resolved, first, that said dividend of 40 per cent was not legally declared; second, that there was no intention on the part of those present at said alleged meeting to declare a dividend of 40 per cent to be paid at once, and that it was not intended that the 62-3 per cent which has not been paid, should be paid until the board of directors should fix a date therefor; third, that the stockholders of said corporation hereby ratify the action of the board of directors, held on January 6, 1903, in rescinding the attempted declaration of a 40 per cent dividend or any dividend in excess of 33 1-3 per cent which had been paid."

This resolution was adopted—five hundred and one and one-half shares voting in favor of the resolution, and ninety shares against it. The other shares were silent.

This suit was filed January 21, 1903. These are the main points in the evidence. Other matters testified to may be referred to in the opinion.

McMahon & McMahon and W. A. Reiter, for plaintiff:

Statutory requirements relating to the declaration of dividends. *State v. Bonnell*, 35 Ohio St. 10; *Wiswell v. Church*, 14 Ohio St. 31; *Merchants Nat. Bank v. Flour Co.* 41 Ohio St. 552; *State v. Bowers*, 26 O. C. C. 326; *Edgerly v. Emerson*, 23 N. H. 555 [55 Am. Dec. 207]; *Porter v. Robinson*, 30 Hun 209; *Halifax v. Francklyn*, 3 Mew's Digest 930; *Chase v. Tuttle*, 55 Conn. 455 [12 Atl. Rep. 874; 3 Am. St. Rep. 64]; *Cupp v. Seneca Co. (Comrs.)* 19 Ohio St. 173; *State v. Wilkesville Tp. (Tr.)* 20 Ohio St. 288; *Place v. Taylor*, 22 Ohio St. 317; *Merchant v. North*, 10 Ohio St. 251.

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Board of directors under the statute have control of the corporation with full power to declare a dividend. *Sims v. Railway*, 37 Ohio St. 556; 1 Cook, Stock & Stockholders (3d ed.) 727; *Municipal Freehold Land Co. v. Pollington*, 63 Law T. (N. S.) 238.

Acquiescence and ratification. *United States Rolling Stock Co. v. Railway*, 34 Ohio St. 450; *Handley v. Stutz*, 139 U. S. 417 [11 Sup. Ct. Rep. 530; 35 L. Ed. 227]; *Samuel v. Holladay*, 1 Wool. 400; 3 Clark & Marshall, Corporations 2084.

Negative pregnant. *Knox Co. Bank v. Lloyd*, 18 Ohio St. 353; *Larimore v. Wells*, 29 Ohio St. 13; *Balt. & O. Ry. v. Walker*, 45 Ohio St. 577 [16 N. E. Rep. 475].

Mere legal conclusion. *Pelton v. Bemis*, 44 Ohio St. 51 [4 N. E. Rep. 714].

A demurrer will not admit the truth of conclusions of law. *Peterson v. Roach*, 32 Ohio St. 374 [30 Am. Rep. 607]; *Hubbard v. Weare*, 79 Iowa 678 [44 N. W. Rep. 915]; *Miller v. Bradish*, 69 Iowa 278 [28 N. W. Rep. 594]; *Beers v. Spring Co.* 42 Conn. 17; *Morawetz, Priv. Corp.* (2 ed.) 445.

As soon as a dividend is lawfully and fully declared out of surplus profits, the corporation becomes indebted from that moment to each stockholder for the amount of his share, and he may recover the same in an action against the corporation. 2 Clark & Marshall, Corporation 1580, 1582; *Beers v. Spring Co.* 42 Conn. 17; *LeRoy v. Insurance Co.* 2 Edw. Ch. (N. Y.) 657; *LeBlanc, In re*, 14 Hun 8; 75 N. Y. 598; *King v. Railway*, 29 N. J. Law 82; *University v. Railway*, 76 N. C. 103 [22 Am. Rep. 671]; *Wheeler v. Sleigh Co.* 39 Fed. 347; *Jackson v. Road Co.* 31 N. J. Law 277; *West Chester & Phila. Ry. v. Jackson*, 77 Pa. St. 321.

When a dividend has been regularly declared and is due, it becomes immediately the individual and absolute property of the stockholders. *Van Dyck v. McQuade*, 86 N. Y. 38; *Jermain v. Railway*, 91 N. Y. 483; *King v. Railway*, 29 N. J. Law 82; *Brundage v. Brundage*, 60 N. Y. 544; *Spear v. Hart*, 3 Rob. 420; *Manning v. Mining Co.* 24 Hun 360; *Beers v. Spring Co.* 42 Conn. 17; *LeBlanc, Ex parte*, 14 Hun 8.

If no time is fixed by the resolution, the dividend is payable on demand. *Armant v. Railway*, 41 La. Ann. 1020 [7 So. Rep. 35]; *Philadelphia, W. & B. Ry. v. Cowell*, 28 Pa. St. 329 [70 Am. Dec. 128].

If no time is fixed, the law implies a reasonable time. *Beers v. Spring Co.* 42 Conn. 17.

When a corporation declares a dividend, the earnings represented by the dividend become a debt due to the owner of the stock at the time of the declaration. *Wheeler v. Sleigh Co.* 39 Fed. Rep. 347; *Beers v. Spring Co.* 42 Conn. 17.

When the property of the corporation exceeds the capital stock,

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the excess is surplus, which may be divided among the stockholders, either in money or property. *Williams v. Telegraph Co.* 93 N. Y. 162.

Van Deman, Burkhardt & Shea, for defendant:

As to pleading. *Lowe v. Phillips*, 14 Ohio St. 308; *Crawford v. Satterfield*, 27 Ohio St. 421; Bates, Pl. & Pr. 911.

Notice. *Pennsylvania & O. Canal Co. v. Webb*, 9 Ohio 136.

Dividends can lawfully be declared and paid only out of profits. *Painesville & Hudson Ry. v. King*, 17 Ohio St. 534; *Miller v. Ratterman*, 47 Ohio St. 141 [24 N. E. Rep. 496]; *Slayden v. Coal Co.* 25 Mo. App. 439; *Lockhart v. Van Alstine*, 31 Mich. 76 [18 Am. Rep. 156]; 3 Thompson, Corporations Sec. 4290; Cook, Stockholders Sec. 543; *King v. Railway*, 29 N. J. Law 82; Bliss, Code Pleading Sec. 332; Bates, Pl. & Pr. 7800; *Larwell v. Burke*, 10 Circ. Dec. 605 (19 R. 513); 3 Clark & Marshall, Corporation 1903.

Power to declare dividends. 2 Thompson, Corporation Secs. 2128, 2142; 3 Clark & Marshall, Corporation 1906, 1907, 1908, 1909, 1960, 1961, 1970; 2 Clark & Marshall, Corporation 1635, 1636, 1637; *Ford v. Thread Co.* 158 Mass. 84 [32 N. E. Rep. 1036; 20 L. R. A. 65; 35 Am. St. Rep. 462].

Notice and place of meetings. 3 Clark & Marshall, Corporation 1960, 1970, 2080, 2081, 2082, 2083; Thompson, Corporations Secs. 686, 700, 706, 708, 823, 3936; *Curtin v. Mining & Ditch Co.* 130 Cal. 345 [62 Pac. Rep. 552; 80 Am. St. Rep. 132]; *Doernbecher v. Lumber Co.* 21 Ore. 573 [28 Pac. Rep. 899; 28 Am. St. Rep. 766]; *Little Rock Bank v. McCarthy*, 55 Ark. 473 [18 S. W. Rep. 759; 29 Am. St. Rep. 60]; *State v. Bonnell*, 35 Ohio St. 10; *Merchants Nat. Bank v. Flour Co.* 41 Ohio St. 552.

First duty of the corporation to pay its debts. *Elliott v. Abbott*, 12 N. H. 549 [37 Am. Dec. 277]; *Stowe v. Wyse*, 7 Conn. 214 [18 Am. Dec. 99]; *Whittaker v. Bank*, 52 N. J. Eq. 400 [29 Atl. Rep. 203]; *Pike Co. v. Rowland*, 94 Pa. St. 238; Homer Dis. Con. G. M. 39 Eng. Ch. 546; Port. Con. C. M. L. 42 Eng. Ch. Div. 160; *Farwell v. Copper Wks.* 8 Fed. Rep. 69; 10 A. & E. Enc. of Law 323; *Wiggim v. Baptist Church*, 49 Mass. (8 Metc.) 307; *Stebbins v. Merritt*, 64 Mass. (10 Cush.) 27; *Westcott v. Mining Co.* 23 Mich. 145; *People v. Batchelor*, 22 N. Y. 128; *State v. Ferguson*, 31 N. J. Law 124; Angel & Ames, Corporations Sec. 492; Grant, Corporations 156-158; *State v. Railway*, 3 Circ. Dec. 516 (6 R. 412); *Commonwealth v. Cullen*, 13 Pa. St. 133 [53 Am. Dec. 450]; *Covert v. Rogers*, 38 Mich. 363 [31 Am. Rep. 319]; *Ben Bow v. Cook*, 115 N. C. 324 [20 S. E. Rep. 453; 44 Am. St. Rep. 454]; *Chase v. Tuttle*, 55 Conn. 455 [12 Atl. Rep. 874; 3 Am. St. Rep. 64]; *Bryant v. Goodwin*, 9 Ohio St. 471; *Wiswell v. First Cong. Church*, 14 Ohio St. 31; *State v. Cronan*, 23 Nev. 437 [49 Pac. Rep. 41]; *Hill v. Mining Co.* 119 Mo. 9 [24 S. W. Rep. 223]; *Smith v. Law*, 21

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N. Y. 296; *Hilles v. Parrish*, 14 N. J. Eq. 380; *New Haven Trust Co. v. Doherty*, 75 Conn. 555 [54 Atl. Rep. 209; 86 Am. St. Rep. 239]; *Bosworth v. Allen*, 168 N. Y. 157 [61 N. E. Rep. 163; 55 L. R. A. 751; 85 Am. St. Rep. 667]; *Winchester v. Howard*, 136 Cal. 432 [64 Pac. Rep. 692; 89 Am. St. Rep. 153]; *Clark & Marshall, Corporations* 1582; *Slayden v. Coal Co.* 25 Mo. App. 439; 3 *Clark & Marshall, Corporations* 1902, 1905, 1908; 2 *Thompson, Corporations* 2128, 2142; *King v. Railway*, 29 N. J. Law 82; *Cook, Stockholders* Sec. 543.

Errors of the court upon the trial of the case. *Dennis v. Manufacturing Co.* 19 R. I. 666 [36 Atl. Rep. 129; 61 Am. St. Rep. 805]; *State v. Buchanan*, Wri. 233; *High Court I. O. F. v. Zak*, 136 Ill. 185 [26 N. E. Rep. 593; 29 Am. St. Rep. 318]; *American Wire Nail Co. v. Gedge*, 96 Ky. 513 [29 S. W. Rep. 353]; *Beers v. Spring Co.* 42 Conn. 17.

SNEDIKER, J.

In this case the first question which presents itself for solution is, whether a valid dividend was declared by the board of directors of the Bookwalter Wheel Company on September 8, 1902.

This is an Ohio corporation for profit and its board of directors, who under the statute control, exercise and conduct the property, business and powers of the corporation, would be governed in their declaration of a dividend by any provision found relative thereto in the Revised Statutes of Ohio, and by any by-law passed by the corporation not inconsistent therewith.

Revised Statute 3269-1 (Lan. 5218) provides as follows: (Corporate dividends to be paid from surplus profits only.) Be it enacted by the general assembly of the state of Ohio, that "it shall not be lawful for the directors of any corporation organized under the laws of this state to make dividends except from the surplus profits arising from the business of the corporation.

Revised Statute 3260-2 (Lan. 5219) provides: (Unpaid interest due corporation not to be included in profits.) "In the calculation of the profits of any corporation previous to a dividend, interest then unpaid, although due, on debts owing to the company, shall not be included.

Revised Statute 3269-3 (Lan. 5220) provides: (Surplus profits: how ascertained; prohibiting advertisement of capital not subscribed and paid in.) "In order to ascertain the surplus profits, from which alone a dividend can be made, there shall be charged in the account of profit and loss, and deducted from the actual profits—

"1. All the expenses paid or incurred, both ordinary and extraordinary, attending the management of the affairs and the transaction of the business of the corporation.

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"2. Interest paid, or then due or accrued on debts owing by the corporation.

"3. All losses sustained by the corporation, and in the computation of such losses, all debts owing to the corporation shall be included which shall have remained due without prosecution, and no interest having been paid thereon for more than one year, or on which judgment shall have been recovered, and shall have remained for more than two years unsatisfied, and on which no interest shall have been paid during that period;" * * *.

So far as these sections of the Revised Statutes are concerned, we find from the evidence that the directors substantially complied with them in declaring its dividend. The company was at the time in a splendid financial condition, without indebtedness, with visible assets of \$120,170.31, and had a surplus fund of over \$13,000,—the net earnings for the year 1901-2 being \$31,382.46.

Under the statutory law of Ohio, a corporation may provide for the time, place and manner of calling, and conducting its meetings, and for the duties of its officers, etc.

Section 5 of the by-laws of this corporation provides that it shall be the duty of the board of directors to meet, the first Tuesday of each month, to transact such business as may come before it. A majority of said board shall constitute a quorum to transact business. Special meetings may be called by president or secretary at any time.

Section 6 provides, it shall be the duty of the president to preside at all meetings of the stockholders and directors, to sign the records thereof, etc.

Section 7 provides, it shall be the duty of the vice president to perform the duties of the president during his absence from the office of the company, or inability.

The meeting of September 2 was a regular and stated meeting of the board, being on the first Tuesday of the month. At this meeting, being the first after the termination of the fiscal year of the company, it was customary for the secretary to present for the consideration of the board the annual inventory.

The minutes of this board meeting show that the secretary announced that the inventory was under way, but not complete. No adjournment is shown.

On September 8, the Board came together again, the testimony showing that the secretary had notified them—except Mr. Gamble—that he was now ready with his inventory. The inventory was read, and after informal discussion, the dividend in question, on motion of

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C. L. Bookwalter and seconded by W. A. Mays, was declared. The board then adjourned.

The objections of the defendant as to the legality of this meeting are: First, that it was a special meeting called solely for the purpose of receiving the inventory of the property and the effects of the corporation, and that that was the only business which could be lawfully conducted thereat. Second, that notice was not served on all the directors of the calling of such meeting, and especially upon Mr. Gamble.

If this had been a special meeting solely for the purpose alleged, the contention of the defendant would carry some weight, but looking at the minutes of both meetings and considering the oral testimony in the case, with reference to that, we cannot come to that conclusion. The fact is, the meeting of September 2 disbanded without formal adjournment, and the business which would have been conducted on that day was concluded on September 8, at which time the secretary notified them severally and personally that he would be ready with the inventory.

There is nothing illegal about this, nor about their conducting such other legal business as it was their custom to do at the September meeting in each year. Common sense and the law are never very far removed from each other. It seems to us that this is the common sense way of looking at this situation. No notice, of course, was necessary to be given the directors for the regular and stated meeting of the board on September 2, which was consistent with the by-laws. Each director was presumed to know that on that day at that time such meeting would be held, and the by-laws do not provide for any notice. Notice is required when a director or stockholder would be ignorant of the occasion without it, but when he knows without notice, or when the time and place of meeting is so fixed that he is presumed to know, no notice is required, and if our view of this matter is correct, and the meeting of September 8 was but an adjournment of the meeting of September 2, and was intended to, and did accomplish what would have been done at the meeting of September 2, had the inventory been ready, the business done at the meeting of September 8 being entirely proper to be done at that meeting of September 2, no notice would be necessary to the several directors, of the meeting of September 8. See *State v. Bonnell*, 35 Ohio St. 10; *Wiswell v. First Cong. Church*, 14 Ohio St. 31.

So that the failure to notify Mr. Gamble would not be important in this case, nor in any sense render either meeting invalid, nor the things done there futile and void.

Suppose, however, that the meeting of September 8 was a special meeting and irregular because of the failure to notify Mr. Gamble. No objection, so far as the records of the corporation show, has ever been

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made to it on that ground by any director, nor has the legality of the dividend since been questioned by the old or new boards because of that fact. A new board was elected January 19, 1903. Since then other boards have annually been elected, and by none of these to the present time has any action been taken rescinding the declaration of September 8, because of the alleged irregularity of the meeting, and it seems to us that the objection, if made, should come from this source. The board of directors under the statute have controlled the corporation and its affairs, with full power to declare a dividend consistent with the statute, and while the stockholders might, by resolution, advise them that action looking to the rescission of an illegal and invalid declaration of dividend should be taken, we doubt if they could, by resolution, in a general stockholders' meeting, rescind, all or any part of a dividend.

In the language of the Supreme Court of Ohio, in the case of *Simms v. Railway*, 37 Ohio St. 565.

"They [the directors] represented the corporation in all its business affairs, and were authorized to transact all the corporate business within the scope of its authority. In the exercise of these powers, the directors are at all times subject to the equity jurisdiction of the courts, on the application of a stockholder or a minority of stockholders, to restrain all breaches of trust, or the exercise of powers not delegated to them, to the injury of stockholders.

"If, however, the directors, who are presumed to represent the will of the majority, act within the scope of their powers, their will must govern in the absence of fraud or breach of trust. *Dodge v. Woolsey*, 3 O. F. D. 300 [59 U. S. (18 U. S.) 331, 342; 15 L. Ed. 401]; *Ware v. Grand Junction Co.* 2 Russ. & M. 470; *Gifford v. Railway*, 10 N. J. Eq. 171; *Stevens v. Railway*, 29 Vt. 545; *Bissell v. Railway*, 22 N. Y. 258; *Kean v. Johnson*, 1 Stock. Ch. 401; Field, Corporations Sec. 141-142."

And whether the directors in the case at bar did or did not act within the scope of their powers is for a court of equity to determine in a proper case. The action taken by the stockholders in their attempt to rescind the dividend we do not, therefore, consider as conclusive.

Further objection is made to the declaration of this dividend on the ground that it was fraudulently brought about by Messrs. Catrow & Mitchell, and was intended, together with other alleged acts of these gentlemen, to cripple the company to the benefit of a similar concern which Mitchell is claimed to have had it in mind to start, prior to and at that time. Reference is made to the Mitchell Wheel Co. which Mr. Mitchell did promote after his resignation from the secretaryship on

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As to these charges, the court has only to say that we find them wholly unfounded and unwarranted so far as any testimony in this case showed. Suspicions are not facts, nor can facts always be built about them so skillfully as to give them the appearance of solidity necessary to convince. The splendid success of this company for years, and especially for the years 1889, 1900, 1901 and 1902, shows that not only the gentlemen referred to, but everyone interested in the concern, were acting honestly and harmoniously for its best interest.

In 1899, as we have said, the net earnings were \$26,299.70; in 1900, \$26,390.24; in 1901, \$26,180.28, and in 1902, the year in question, \$31,382.46. In other words, in four years, with a capital stock of \$75,000, the company's net earnings were \$110,252.68, during all of which time Mr. Mitchell was the company's secretary and manager. Nor was the dividend for 1902 extraordinary when compared to dividends of former years to which I have already referred.

We are of the opinion that this dividend was lawfully declared without ulterior motive on the part of the directors of the company, and that its declaration did not constitute either a fraud on the company or a breach of trust on the part of the directors.

Having found the dividend lawfully declared, what was the effect of the action of the board of directors on January 6, 1903, rescinding 6 2-3 per cent of said dividend?

We must remember, of course, that the dividend declared was in its entirety 40 per cent; that the separation of 6 2-3 per cent to be paid at a later date, did not individualize that and make it a thing to be considered apart from the other 33 1-3 per cent. Whatever rights accrued to the stockholders at the declaration of the dividend would pertain to the whole dividend, so that any subsequent action of the board would be subject to these rights.

As the evidence shows, the dividend was declared; notice of the same with check was sent to each stockholder; the amount of his dividend was credited to each on the ledger of the company, and the surplus fund charged with it.

"When a corporation declares a dividend, the earnings represented by the dividend are no longer represented by the stock, but become a debt due to the owner of the stock at the time of the declaration, * * *. That the dividend is payable at a future date does not affect the stockholder's right." The moment a dividend is declared by a joint stock company, the company becomes debtor and the stockholder creditor for the amount payable on demand. *Wheeler v. Sleigh Co.* 39 Fed. Rep. 347.

See also, *Keppel v. Railway*, Chase Dec. 167 [14 Fed. Cas. 357].

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In the case of *Beers v. Spring Co.* 42 Conn. 24, the court passing on the case say:

"When the defendant corporation, by the legal votes of its directors, declared the dividends in question from profits theretofore earned and received, made the same payable without interest at such time as might be directed by the board, and ordered the amount to be placed pro rata to the credit of the stockholders upon its books, the share of each stockholder in the several amounts was thereby severed from the common funds of the corporation and became his individual property. Thenceforth the company owed him a debt, payment of which at a proper time he might demand, and upon refusal, enforce by the aid of a court of equity. *King v. Railway*, 29 N. J. Law 504; *Redfield, Railways* (1 ed.) 240, 597; *LeRoy v. Insurance Co.* 2 Edw. Ch. 657. The proviso as to the time of payment does not absolve the company from all obligation to him; there remain all the essential elements of a debt, certain in amount, and certain to be paid upon a day not yet appointed, but which it is the duty of the debtor at some time to name. The legal effect of the vote is, that the debt is to be paid within a reasonable time. The corporation having declared that it had received for and owed to each stockholder a certain sum of money, and having set the same apart from its own funds for his sole and separate use, cannot thereafter nullify its votes or repudiate its obligations by declining to pay the dividend or to name any time when it would pay it."

When, therefore, this dividend was declared, it became a debt of the company to the stockholder as an individual to be paid within a reasonable time, and as such debt, was beyond the control of both the stockholders and directors.

What was the condition of the company in the months following this declaration? The cash book balance once a month shows that they had on hand September 30, \$2,482.47; October 31, \$7,037.42; November 31, \$8,292.50; necessary to pay this 6 2-3 per cent, \$4,550. So that this 6 2-3 per cent ought to at least have been payable November 31, 1902, and was due and payable when this suit was brought in January, 1903.

The resolutions passed by the board of directors were a recognition of the validity of the act of the board on September 8, and we have said we do not believe that the stockholders assembled in general meeting had authority to nullify the act of the board as they attempted to do in March of 1903. However, if the board did act legally, as we have found, no such resolution was necessary, and even if illegal, how can the stockholders be heard to complain who have received, and are enjoying, the benefit of 33 1-3 per cent of the dividend? This of itself is plainly an acquiescence in the board's act and if so, would be another

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reason why it should be carried into effect, for, as I said in the beginning of the discussion of this point, the dividend is an entirety and must always be so regarded by the court.

From the foregoing, I am persuaded to find for the plaintiff against the defendant in the sum of \$600 with interest from January 19, 1903.

Affirmed by both circuit and Supreme Courts.

CORPORATIONS—OFFICERS' LIABILITY.

[Superior Court of Cincinnati, Special Term, December 24, 1906.]

BLANCHE A. SNODGRASS V. MORRISON & SNODGRASS CO. ET AL.

1. THE CORPORATION ALONE LIABLE FOR FAILURE OF ITS AGENT TO PERFORM HIS DUTY.

Although an agent is jointly liable with the corporation for his torts, he is not liable to a third party for his failure to perform his duty as a servant of the corporation; hence, an agent of a corporation is improperly joined in an action against the corporation for damages for failure to transfer certain stock on the books of the company and issue a new certificate thereof.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 1371-1422.—Ed.]

2. DECLARED DIVIDENDS ARE DEBTS OF A CORPORATION OWING TO STOCKHOLDER.

As soon as dividends are declared they become a debt of the corporation; and an officer of such corporation cannot be joined in an action against the company to recover such dividends upon mere failure to pay.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 745-770.—Ed.]
[Syllabus approved by the court.]

DEMURRER.

C. W. Baker, for plaintiff.

Robertson & Buchwalter, for defendants.

HOSEA, J.

The petition in this case sounds in tort, and is predicated on the refusal of the company and its president to enter on the books of the corporation a transfer of stock duly made and indorsed to plaintiff and to issue a new certificate thereupon, whereby plaintiff claims to have been damaged to the amount of the value of said stock. A second cause of action stated is based on the refusal to pay over to her dividends declared on said stock prior to the indorsement of said stock to her,—there being a clause in the statement of the first cause of action that she has been the owner of said stock for a considerable time, which, however, was stricken out, on motion, as surplusage. The demurrer is filed by Andrew Morrison for want of facts sufficient to constitute a cause of action against him.

The general rule is, that all who join in furthering a wrongful

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act injurious to another are to be regarded as principals and may be sued jointly as such. On this ground, it is settled law that a corporation may be joined as a defendant with the agent or servant, for a tortious act committed by the latter in the line of his previously conferred authority. But, while this is settled law with respect to tortious acts of commission, a mere failure to act in respect of a duty as a servant is held to be a violation of a duty not owed by the servant to a third party, but to the corporation. Liability to the injured party therefore is not that of a servant, between whom and said party there is no privity, but of the corporation on the principle of *respondeat superior*. As the corporation selects the officers by whom the transfers of stock are to be effected, it is responsible for their acts, and must answer for their negligence or default whenever the rights of third parties are infringed thereby. *Stockbridge Iron Co. v. Iron Works*, 102 Mass. 80; *Woodward v. Webb*, 65 Pa. St. 254; *Lowry v. Bank*, 1 Taney 310 [15 Fed. Cas. 1040]; 1 Thompson, Negligence (2 ed.) Par. 611; 1 Cyc. 1210, 920.

The statutory provision of Ohio,—Rev. Stat. 3254 (Lan. 5195),—requiring the president and secretary of a corporation to sign certificates of stock, does not operate to impose on these officers any individual duty independent of their capacity as servants of the corporation, and does not, therefore, change the rule.

The demurrer of Morrison must, therefore, be sustained as to him, under the first cause of action.

The second cause of action is open to objections of another kind. The law is well established that when dividends are declared by the directors of a corporation, a right to sue for and collect the same as a debt vests in the stockholder; in a word, they become a debt of the company to the stockholder entitled. If this be so, it is obvious that a refusal to pay cannot be a tort. For this and the reasons applicable to the first cause of action, an officer of the company who has failed in this duty to pay cannot be joined in an action against the company, since he has failed in his prescribed duty to the company, rather than to the third party.

But again, while Ohio courts have held that an equitable owner whose title is not recorded may maintain an action for his dividends, it is manifest that until the company is made aware of his equitable title as against a duly recorded title in another it could not be required to pay. The allegations fail to show any facts constituting the equitable title, or any notice of the same to the company.

The demurrer is well taken, therefore, also to the second cause of action.

Demurrer sustained as to Morrison.

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ASSOCIATIONS—PARTNERSHIP.

[Hamilton Common Pleas, December 11, 1905.]

MILLER DU BRUL & PETERS MFG. CO. v. LAIDLAW-DUNN-GORDON CO.

1. CREATION OF PARTNERSHIP RELATION AS BETWEEN THE PARTIES.

The relation of partners is not created as between the parties to a contract unless it was their intention to form a partnership, but as to third persons their acts and conduct may be such as to estop them from denying the existence of such relation.

[For other cases in point, see 6 Cyc. Dig., "Partnership," §§ 30-53.—Ed.]

2. MEMBERS OF ASSOCIATION LIABLE FOR ASSESSMENTS.

An association composed of corporations, firms and individuals, formed for purposes of mutual protection of its members and their employes, by forming a basis of dealings between them, and for the investigation and adjustment of their difficulties is not a partnership as between such members; nor is such an organization an illegal enterprise in which a corporation cannot lawfully join; hence a corporation that has joined such an association is liable for an assessment levied to pay the running expenses thereof.

[For other cases in point, see 1 Cyc. Dig., "Associations," §§ 51-58.—Ed.]

[Syllabus by the court.]

DEMURRER to petition.

A. B. Dunlap, for plaintiff:

Corporations have no power to become members of a partnership. Cook, Priv. Corp. Sec. 678; *Catskill Bank v. Gray*, 14 Barb. 471; 3 Kent 23; *Karrick v. Hannaman*, 168 U. S. 328 [18 Sup. Ct. Rep. 135; 42 L. Ed. 484]; Collyer, Partnership; Story, Partnership Sec. 2; Lindley, Partnership Chap. 1, p. 12; Bouvier's Law Dict. citing, *Delaney v. Van Aulen*, 84 N. Y. 16; *Connolly v. Davidson*, 15 Minn. 519 [2 Am. Rep. 154]; *London Assur. Co. v. Drennen*, 116 U. S. 461 [6 Sup. Ct. Rep. 442; 29 L. Ed. 688]; *Gill v. Kuhn*, 6 Serg. & R. 333; *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160 [68 N. E. Rep. 1004]; *Parsons, Partnership* (4 ed.) 60; *Bates, Partnership* Sec. 75; *Snyder v. Chamber of Commerce*, 53 Ohio St. 1 [41 N. E. Rep. 33].

Voluntary associations not for profit are not partnerships. Niblac, Ben. Soc. (2 ed.) Sec. 80; *Brown v. Stoerkel*, 74 Mich. 269 [41 N. W. Rep. 921; 3 L. R. A. 430]; *Burt v. Lathrop*, 52 Mich. 106 [17 N. W. Rep. 716]; *Richmond v. Judy*, 6 Mo. App. 465; *Missouri Bottlers' Assn. v. Fennerty*, 81 Mo. App. 525; *Burke v. Roper*, 79 Ala. 138; *White v. Brownell*, 4 Abb. Pr. (N. S.) 162; 25 Am. & Eng. Enc. Law (2 ed.) 1131, 1136; *Beach, Priv. Corp.* Sec. 909; *State v. Chamber of Commerce*, 6 Dec. 363 (4 N. P. 244); *Clarke & Marshall, Priv. Corp.* Sec. 185d-4; *De Witt v. San Francisco*, 2 Cal. 289; *New York & S. Canal Co. v. Bank*, 7 Wend. 412; *Payne v. Thompson*, 44 Ohio St. 192 [5 N. E. Rep. 654]; *Harvey v. Childs*, 28 Ohio St. 319 [22 Am. Rep. 387]; *State v. Oil Co.* 49 Ohio St. 137 [30 N. E. Rep. 279; 15 L. R. A. 145; 34 Am. St. Rep.

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541]; *Wehrman v. McFarlan*, 9 Dec. 400 (6 N. P. 333); *Bank v. Wagon Co.* 65 Ohio St. 559 [63 N. E. Rep. 1124]; *Merchants' Nat. Bank v. Wagon Co.* 9 Dec. 380 (6 N. P. 264); *Merchants' Nat. Bank v. Wagon Co.* 10 Dec. 81 (7 N. P. 539).

Appeal to equity. 27 Am. & Eng. Enc. Law (1 ed.) 364; *Herman, Estoppel* 1318, Sec. 1181; *Taylor v. Weld*, 5 Mass. 109.

F. W. Cottle and Ernst, Cassatt & McDougall, for defendant.

PFLEGER, J.

The plaintiff, a corporation, on behalf of itself and others members of the National Metal Trades Association, a voluntary association consisting of itself and many other individuals, partnerships and corporations, who are too numerous to bring before the court, says, that in December, 1899, the defendant company, together with other persons, firms and corporations, to protect their mutual interests, formed an association known as the National Metal Trades Association, and adopted a constitution and by laws, whereby the objects of said association were declared to be as follows:

1. The adoption of a uniform basis of just and equitable dealings between the members and their employes, whereby the interests of both will be properly protected.

2. The investigation and adjustment by proper officers of the association of any question arising between members and their employes.

The petition alleges that, although the defendant was not present at the first meeting, it afterwards, in March, 1900, made application to join said association, was elected to membership and subscribed to said constitution and by laws; that thereafter it participated in the deliberations of the meetings, and became obligated under such by laws to pay certain dues and assessments, as revenues to carry on said association; that assessments were made upon the members upon the basis of the number of operatives employed by each; that certain assessments were paid by the defendant, and that others regularly assessed against said defendant were not paid, although it accepted the benefits of the association; and that there is due on said unpaid assessments the sum of \$590.80, with interest on various items, for which the plaintiff prays judgment.

To this petition a general demurrer was filed by the defendant, on the ground that the petition did not contain facts sufficient to constitute a cause of action.

Briefly, the defendant claims that an Ohio corporation cannot become a member of such a mutual association, because it is *ultra vires*.

The demurrer admits the truthfulness of the allegations made, and only such inferences of invalidity or illegality as the admitted

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facts fairly warrant. No question is raised regarding the right of the plaintiff to sue for itself and others. The defendant urges that inasmuch as both parties hereto are Ohio corporations neither one could be a member of this association; that this association is in fact a partnership, and if indeed it is not a legal partnership, it is an organization of which a corporation could not become a member, and that no liability accrued by reason of such membership in any amount which could be fixed by the board of administrative council of said association. On the other hand, it is urged that the association is not a partnership, and if it were, then, as between the parties, courts will not excuse participants from paying their share of any liability, and mainly because the contract being executed, the doctrine of *ultra vires* cannot be plead to evade such liability.

That a corporation cannot become a member of a partnership is conceded as having been settled elsewhere, as well as in our state, by several recent decisions. It is claimed that the association is a partnership because it was created by contract; that it has a capital stock, to wit, a reserve fund, and that it proposes to control its members in the adjustment of difficulties arising between such members and their employees. That these are some of the usual attributes of a partnership is true, but that they are decisive tests of a legal partnership does not follow. Organizations not for profit are created by contract, usually have a reserve fund and control its members, and yet these are not partnerships. Some authorities hold that the main characteristic of a partnership is the sharing of some mutual gain or profit (Lindlay, Partnership 1) or of profit and loss. Clark & Marshall, Priv. Corp. Sec. 185c. To this characteristic is added that of mutual agency as a result of such community of interest by the Supreme Court of the United States. *Karrick v. Hannaman*, 168 U. S. 328-334 [18 Sup. Ct. Rep. 135; 42 L. Ed. 484]. Lindlay excludes from this operation societies and clubs, the objects of which are not to share profits, but to afford mutual protection. Lindlay, Partnership Sec. 5, p. 120. It is said with some force that protection, while it may be a benefit, does not prove that it is the gain or profit contemplated by the authorities. And it is said as a general rule that as to third persons certain conduct often estops participants from denying that a partnership exists, but that as between parties there can be no partnership unless one is intended. *London Assur. Co. v. Drennan*, 116 U. S. 461 [6 Sup. Ct. Rep. 442; 29 L. Ed. 688].

Plaintiff forcibly argues that it does not appear from the petition that the organization employs a capital for the purpose of gain or profit; that there is a mutual agency between its members, and that it was so intended between such members.

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"The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows societies to imitate the organization and methods of corporations so far as their rights between themselves are involved, and will enforce their articles of agreements (nothing illegal or unconstitutional appearing) as between the parties to them, but the public and the creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such an association has the shield of incorporation." Abbott's Digest of Corporations, under the title "Association."

Defendant's counsel concedes that this metal trades association is not an organization for money profit, but that it falls within the definition of a copartnership to "further its enterprise," as indicated by Morawetz, Priv. Corp. Sec. 220. By this is evidently meant organizations having the salient features of a partnership but organized for the purpose of furthering the enterprise of the corporation. The court is of the opinion that the allegations of the petition do not indicate this mutual association to be a copartnership.

Defendant's counsel insists, however, that whether legally a copartnership or not, the organization was permitted to adopt for its members a uniform basis for just and equitable dealings between them and their employes, and to investigate and adjust questions arising between them.

State v. Oil Co. 49 Ohio St. 137, 185 [30 N. E. Rep. 279; 15 L. R. A. 145; 34 Am. St. Rep. 541], is referred to. In that case the entire control of various corporations was given by the directors to certain trustees, who were empowered to select directors, all of which were acts inconsistent with the character of a corporation and against the interests of the stockholders. But the principle there stated, that the directors of a corporation could not delegate their powers to others, so that the corporation would be controlled not by its officers, but by outsiders, was reiterated in *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160 [68 N. E. Rep. 1004], in *Geurinck v. Alcott*, 66 Ohio St. 94 [63 N. E. Rep. 714], and in *Clark & Marshall*, Priv. Corp. Sec. 185. It must follow that, no matter what the organization is in fact, whether a copartnership or a voluntary society, if its purpose be to surrender to outsiders the powers which strictly belong to the directors of a corporation, such corporation cannot legally become a member of such organization. There are, however, many things which a corporation may share jointly with others without making such organization a partnership or inconsistent with the objects of a corporation.

Corporations, it has been held, may combine stock and work for a product to be divided between them and not for sale as where each

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party is to keep and use the share that belongs to it. Parsons, Partnership (4 ed.) Sec. 61. Mere community of interest as joint owners or tenants in common, where none of the parties acting alone can transfer or dispose of the entire property or act for all others, can not constitute the parties copartners to each other. Clark & Marshall, Priv. Corp. Sec. 185d-4, and cases there cited. Suppose these corporations, in the interest of economy, jointly paid an organization of merchants' police or watchmen to protect their properties from fire, or patronized a mutual credit association, through which the financial ratings of customers might be profitably obtained; or they paid a board of trade organization for the privilege of having its officers meet at a designated place to exchange business, it could hardly be claimed that these acts were *ultra vires*. Neither could this be claimed for an organization of lawyers, or experienced men of business, who were paid outright sums of money as compensation for amicably adjusting the difficulties corporations might have with their employes.—

Let us further assume that, instead of paying any of these organizations a stipulated amount of money a number of such corporations secured an organization, not for the purpose of profit, but to economize and to reduce the expense of obtaining the benefit of any such service, and to meet the actual cost of maintenance, in lieu of an arbitrary sum of money, determined to divide the cost thereof by the amount of capital invested by each corporation, or by the number of square feet occupied by their respective plants, or, as in the case at bar, by the number of employes employed by each corporation, would this be an organization for profit, or would participation therein endanger the rights of the stockholders, or take away the power of a board of directors, any more than the payment of a fixed sum of money which was formerly obtained for the same service? If the objects of this National Metal Trades Association are faithfully set forth in its preamble, there is nothing apparent which points to any illegal feature, but, to the contrary, it has the commendable purpose of protecting both labor and capital and adjusting amicably their many differences.

An organization called the Missouri Bottlers' Association, the object being to secure the return of certain bottles used in their trade, and to protect the property and interests of its members against illegal traffic in such bottles or property, was held to be a legal body, with power to assess its members, and such an assessment to provide for fees and dues was held valid. *Missouri Bottlers' Assn. v. Fennerty*, 81 Mo. App. 525.

A similar organization for mutual protection and assessment of members was upheld in *Burt v. Lathrop*, 52 Mich. 106 [17 N. W. Rep. 716], and also in *Brown v. Stoerkel*, 74 Mich. 269 [41 N. W. Rep. 921];

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3 L. R. A. 430]. *White v. Brownell*, 4 Abb. Pr. (N. S.) 162, had under review the liability of members of an open board of trade of stock brokers, and this was held to be not a partnership, but a legal organization.

It is not apparent from the allegations in the petition that the adoption of means used to protect the interests of employer and employe and the adjustment of their difficulties is compulsory if it were assumed that such participation in the association would in fact be a delegation of power which the directors of a corporation must retain. Whatever criticism might be made of the unreported decision of the Supreme Court in the *Standard Wagon Co.* case, it is plain to be seen that, notwithstanding the firm adherence of the Supreme Court to the principle that a corporation cannot become a member of a partnership (*Geurinck v. Alcott*, *supra*; *Merchants' Nat. Bank v. Wehrmann*, *supra*), it is held in the last case that a national bank having purchased an interest in a partnership dealing in real estate, was liable, not as a partner, but as a part owner of the property of the syndicate for its share of the expense of purchasing, managing, improving and disposing of the property.

I am not forgetful of the fact that in these cases creditors were pursuing their rights. Much could be said in favor of the argument that the contract being executed on one side, a corporation having received the benefits of such contract, cannot plead *ultra vires* to defeat a recovery. It is unnecessary to decide that question at this time. Irrespective of this, however, the court is of the opinion that the National Metal Trades Association, as alleged in the pleading, is not a copartnership, nor an organization for profit, and that membership therein by a corporation is not inconsistent with the character of the corporation, nor is there a delegation of powers from the directors which they are bound in law to retain; and that the amount sued upon, assessed in the manner in which it was, is but a just recompense for a legal service already performed.

The court has been much aided by the arguments and briefs filed by counsel on both sides, which are characteristic of their industry and ability. The demurrer will be overruled.

Roice v. Railway.

LIMITATION OF ACTIONS—RAILROADS.

[Lorain Common Pleas, March, 1907.]

GEORGE B. ROICE V. CLEVELAND, C. C. & ST. L. RY.

TO SECURE ADVANTAGE OF SIX-YEAR LIMITATION, IN ACTION AGAINST RAILWAY FOR KILLING CATTLE, FACTS SUFFICIENT TO CONSTITUTE CAUSE OF ACTION FOR LIABILITY UNDER REV. STAT. 3324 (LAN. 5288) MUST BE ALLEGED.

An action was begun on August 13, 1905, to recover damages for cattle killed upon defendant's railroad track on September 8, 1899. The petition alleged carelessness and negligence on the part of the railroad company in not complying with Rev. Stat. 3324 (LAN. 5288), as to fences and cattle guards, and also alleged that the defendant was guilty of carelessness and negligence in the running of the train which killed said cattle; but did not clearly allege that the cattle were killed by reason of the negligence of the defendant in not properly fencing its right of way. As one defense the railroad company pleaded the four-year statute of limitations, and plaintiff filed a demurrer to said defense: *Held,*

That an action for common-law liability for negligently killing said cattle is barred in four years, and an action for liability created by said statute, is barred in six years, and that, where the petition in such a case states facts sufficient to constitute a cause of action under the common law for negligent management of the train and consequent killing of said cattle, but does not clearly state facts sufficient to constitute a cause of action for liability created by said statute, the demurrer should be overruled.

[For other cases in point, see 5 Cyc. Dig., "Limitation of Actions," §§ 895-906.—Ed.]

[Syllabus by the court.]

DEMURRER to answer.

Skiles, Green & Skiles and J. T. Haskell, for plaintiff.

E. G. & H. C. Johnson, for defendant.

WASHBURN, J.

This case presents a novel question of practice. The plaintiff in his second amended petition, seeks to recover damages for his cattle which were killed upon the defendant's railroad track.

It appears by the petition that they were killed on September 8, 1899, and the petition in this case was filed on August 30, 1905, more than four years and a little less than six years after the cattle were killed.

The railroad company answered that petition, and set up as a third defense that the cause of action set forth in the second amended petition did not accrue within four years next before the commencement of the action; and the plaintiff has filed a demurrer to said third defense, on the ground that it does not state facts sufficient to constitute a cause of defense in favor of said defendant and against said plaintiff.

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A reading of the petition leaves the court in doubt as to just the kind of an action the plaintiff seeks to recover on. That is, as to whether he is seeking to recover upon a common-law liability for the defendant's wrongful and negligent management of its train, which resulted in injury to the cattle, or whether he is seeking to recover upon a liability created by the statute, which requires the railroad company to fence its right of way and provide cattle guards at crossings, etc. Revised Statute 3324 (Lan. 5288).

If the recovery is sought upon the common-law liability, the statute of limitations is a bar to the same; but, if the recovery is sought solely upon the statutory liability, the action having been brought within six years, is not barred by the statute of limitations. *Seymour v. Railway*, 44 Ohio St. 12 [4 N. E. Rep. 236].

The allegations of the petition on this subject are as follows:

"That said defendant on or about September 8, 1899, and prior thereto, had negligently and carelessly failed to construct and maintain a fence sufficient to turn stock on the east side of its right of way in said village of Wellington, at or near a point where the Wheeling and Lake Erie Railroad crosses defendant's right of way, and between said Wheeling and Lake Erie railroad crossing and said Magyar street, and had negligently and carelessly failed and neglected to construct and maintain cattle guards where said public highway used by the public crosses said railroad, sufficient to prevent domestic animals from going upon said right of way of defendant company; to wit, where said defendant's railroad crosses said Magyar street. That defendant's omission to so construct and maintain said cattle guard and said fence allowed domestic animals to stray upon the tracks of defendant's said railroad. That plaintiff owned and was possessed of certain cattle, about twenty dairy cows, which cattle were being unloaded from a car of the Wheeling and Lake Erie Railroad, which crosses said defendant company's right of way; that said cattle then and there, on or about said September 8, 1899, by reason of the carelessness and negligence of the defendant in failing and neglecting to fence and maintain cattle guards, and without fault of this plaintiff, strayed upon the right of way of defendant company.

"Avers that defendant negligently and carelessly ran and managed one of its locomotives with train of cars attached thereto over its said road at said time and place at a high rate of speed, so that the same was run against and over said cattle, whereby four of said cattle were killed and others seriously injured at said time and place by said train of defendant company.

"Plaintiff avers that the defendant was guilty of negligence and carelessness in managing its said train of cars with locomotive attached

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thereto and in failing to discover said cattle upon the right of way of defendant company, when, by the exercise of ordinary care, defendant might have discovered said cattle in time to have avoided killing or injuring them."

The demurrer to the defense set up in the answer searches the record, and ordinarily if the petition sets forth a cause of action, which is not barred by the four-year limitation, the demurrer should be sustained.

The petition alleges that the defendant is a railroad company, owning and operating a railroad; that it negligently and carelessly failed to construct and maintain a fence sufficient to turn stock at a certain point on its railway, and negligently and carelessly failed and neglected to construct and maintain cattle guards where the public highway used by the public crosses said railroad, sufficient to prevent domestic animals from going upon said right of way, and that said cattle, on the day mentioned, "by reason of the carelessness and negligence of the defendant in failing and neglecting to fence and maintain cattle guards, and without the fault of the plaintiff, strayed upon the right of way of the defendant company."

Then if there had followed an allegation that the cattle were killed or damaged "by reason of the want or insufficiency of such fence or cattle guards, or any neglect or carelessness in the construction thereof, or in keeping the same in repair," the petition would probably have stated a cause of action under the statute. But the petition contains no such allegation. There is no allegation in the petition that the cattle were killed or damaged by reason of the want or insufficiency of such fence or cattle guards; but there is an allegation that,

"The defendant negligently and carelessly ran and managed one of its locomotives with train of cars attached thereto, over its said road at said time and place at a high rate of speed, so that the same was run against and over said cattle, whereby four of said cattle were killed and others seriously injured at said time and place by said train of defendant company."

And that, "The defendant was guilty of negligence and carelessness in managing its said train of cars with locomotive attached thereto, and in failing to discover said cattle upon the right of way of the defendant company, when by the exercise of ordinary care defendant might have discovered said cattle in time to have avoided killing or injuring them."

It is apparent that the petition does not allege as a ground of recovery the killing of the cattle by reason solely of defendant's omission to construct and keep in good repair good and sufficient fences and

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cattle guards to turn stock along the line of its road, by reason of which neglect and omission the plaintiff's cattle were run over and killed.

The petition does state facts sufficient to constitute a cause of action under the common law.

But it does not clearly state facts sufficient to constitute a cause of action for liability created by the statute. And under such circumstances it seems to me that the proper thing for the court to do is to overrule the demurrer.

I am constrained to do this, for the further reason, that if the demurrer be sustained, then the defendant is precluded upon the trial of the case from insisting upon the statutes of limitation as against its common-law liability, which is clearly set forth in the petition—the rule being, that the defense of the statute of limitations must be pleaded in order that it may be relied upon at the trial.

The statutes of limitation being a complete defense to the common-law liability, the petition ought to be amended so as to clearly state facts sufficient to constitute a cause of action under the statute, and should be confined to that, so that the defendant may squarely meet that issue and not be prejudiced upon the trial of the case by matters which are clearly barred by the statute of limitations.

But this is only a suggestion, for it is sufficient for the disposition of this demurrer that it does not clearly appear in the petition that said cattle were killed or injured by reason of the defendant's omission to construct and keep in good repair good and sufficient fences and cattle guards, etc.

The demurrer will, therefore, be overruled and exception noted for the plaintiff.

Trust Co. v. Coal & Iron Co.

CONTRACTS—MINES AND MINING.

[Franklin Common Pleas, June 19, 1905.]

CLEVELAND TRUST CO., TR. V. COLUMBUS & H. COAL & IRON CO.

1. CONSTRUCTION OF ROYALTY CLAUSE OF SALE OF MINERALS.

Provisions in a contract granting mining rights in coal lands, that provide for the payment of a royalty of ten cents for each ton of coal mined, to be paid in monthly installments, and further providing it to be the intention of the parties that such monthly installments shall be in an amount of at least \$416.67, and that a certain amount of coal be mined each year, are not intended to fix ten cents per ton as an exclusive rate but that in case the coal should not be mined fast enough the rate should be higher, and such provision expressly provided for a penalty in case of a failure to mine the stipulated amount each year.

[For other cases in point, see 6 Cyc. Dig., "Mines and Mining," §§ 4-14.—Ed.]

2. TECHNICAL WORDS DO NOT DEFEAT INTENTION OF AN AGREEMENT.

The use of technical words or phrases in an agreement or contract will not be allowed to defeat the manifest intention of the parties. Therefore the use of such words as "demise," "release," "mine-let" and "royalty" will not of themselves suffice to defeat or modify an agreement which the parties have, by the words used, actually made.

[Syllabus approved by the court.]

W. O. Henderson, for plaintiff.

Outhwaite, Linn & Thurman, for defendant.

DILLON, J.

A written agreement was made on September 9, 1885, by virtue of which the defendant received the exclusive right, permission and license to enter upon, mine and remove the coal from a tract of land in Athens county, Ohio. The defendant therein agreed to mine the coal on these premises and to take it therefrom and pay a royalty on not less than fifty thousand tons of coal in each and every year thereafter, and to continue to mine and to pay royalty until all the coal that could be practically mined on the said premises should be so mined and paid for. The defendant further bound itself to conduct such mining operations in a good and workmanlike manner, so that all the coal that could be practically mined should be mined and paid for. The defendant further agreed to pay the sum of ten cents per ton for all lump coal so mined.

The contract further provides and declares the intention of the parties to be that such monthly payments under this contract shall be in an amount of at least \$416.67, and that this payment shall be made regularly "whether the monthly proportion of coal on the basis of fifty thousand tons per annum shall have been mined or not, and that any payment so made in advance of coal actually mined, shall be applied as royalty on the coal which may be thereafter mined in excess of the minimum amount herein provided for."

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A provision is further made that if the defendant shall fail or neglect for a period of thirty days to make such monthly payment the lease may at the option of the first party but not otherwise, be declared forfeited and the owner of the property restored to his exclusive possession and ownership of the premises.

A provision is further made that in case mining operations shall be temporarily interrupted by strike or means or agencies beyond its control, the obligation to pay during such time shall not be enforced, but "that save and except the period or periods during which the second party may be interrupted as aforesaid, the second party shall be deemed to be liable for the payment to the first party or his successor in said trust, the amount of royalty which would be due under the terms of this contract in respect to coal mined each month the same as if said coal had actually been mined."

The contract further provides that "when the second party shall have mined and paid for all the coal that can be practically mined on the premises hereby demised, and shall have fully performed all the covenants herein stipulated by it to be performed, the second party shall be permitted to remove from said premises its tracks and fixtures."

The petition alleges that no monthly payments have been made since May, 1904, and asks for a judgment against the defendant for \$2,083.53 and interest.

The answer admits the agreement but says that up to and including the said month of May, 1904, it has paid to the plaintiff in all the sum of \$93,331.96 in monthly payments of \$416.66 each; but that up to said time the defendant has mined and removed from said premises only 734,325.91 tons of coal, and that under the royalty provided in said agreement; to wit, ten cents a ton, the amount due and payable for the coal actually mined and removed would be \$73,432.59. In other words, that the defendant has now paid to the plaintiff the sum of \$19,898.70 more than the royalty at the rate of ten cents per ton would amount to.

The defendant further says that there is now remaining in this tract of land yet to be mined 198,570 tons of lump coal and no more, and that the royalty upon this coal when it has been mined will amount to \$19,857; that, therefore, the defendant having already advanced the payment in the sum of \$19,898.37, it will have paid to the plaintiff \$41.37 more than the royalty of ten cents per ton will amount to, and that it is, therefore, entitled to mine all the rest of the coal in this land without paying any further royalty.

The demurrer to this answer calls for an interpretation of this contract.

In the case of *Raynolds v. Hanna*, 7 O. F. D. 448 [55 Fed. Rep.

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783], in construing a will wherein this identical lease was involved the court (Jackson, J.,) held that, insofar as the question arose as to the construction of the will and as to what source to credit the amounts arising therefrom, this agreement was a lease, and that the funds arising thereunder were a part of the income of the estate and should be so distributed and accounted for.

The question presented to this court was not presented to that court nor was it intended by the use of the word "lease" to involve the question raised here. It must be at once apparent, and it will dispense with considerable argument, to say that no particular nomenclature or set phrases are necessary to be used in order to determine the nature of this contract. Even the use of technical words or phrases in an agreement will not be allowed to defeat the manifest intention of the parties as expressed in the instrument, and, therefore, such words as "demise," "release," "mine-let," and "royalty," etc., as used by the parties will not of themselves be sufficient to defeat or modify the agreement which the parties have, by the words used, actually made. The question before this court is, What does this contract mean?

In one sense it was a sale, for it is apparent that the moment the coal was actually mined the title passed from the owner of the land to the defendant in this case.

The plaintiff's contention is, that these royalties of ten cents a ton were in fact rentals and no more; that the instrument in question is a lease and is not a sale of property. The contention of the defendant is that this agreement, considered in its entirety, is strictly a royalty contract, and that the intention of the parties as shown by this agreement was to limit the payment from the defendant to the owners of this property to the rate of ten cents per ton for the coal actually in the land and no more, and that having paid that amount of royalty they are now released from any further payments.

Probably the most important clause of this contract is the one quoted above where it is expressly declared to be the intention of the parties that a payment of \$416.67 shall be made each month, whether the monthly proportion of coal shall have been mined or not. If we stop at this point to analyze the contract it would be evident in the absence of any other provisions that the contention of the defendant here could not prevail, because up to this point it is apparent that the amount to be paid should be \$416.67 whether they mined any coal or not, and the provision of ten cents per ton was simply a favor to the defendant and is a limit beyond which the owner of the property could not demand. The clause so far would show that not only was one of the considerations of this contract definitely fixed as to guarantee and secure to the owner of the premises a speedy and diligent mining of

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the coal, but the parties themselves agree that however small an amount of coal may be mined the value of this property under this contract shall be in the sum of \$416.67 per month, subject only to the limitation which follows.

At this point, we see the parties preparing for a condition which might exist; to wit, that in the ordinary conduct of the business there might be occasions when the defendant would mine only half that amount of coal—that is to say that while they would be compelled to pay \$416.67 as a matter of fact they might only mine a less amount of coal than was their privilege for said sum. To provide for any such natural fluctuation the clause continues that “Any payment so made in advance of coal actually mined shall be applied.” How? To one exclusive source, to wit: “On the coal which may be thereafter mined in excess of the minimum amount herein provided for.” This contract, therefore, means that the rate of ten cents per ton of coal was not an exclusive rate that they were to pay, but that in case they did not mine the coal fast enough the rate should be higher, and this was the penalty expressly provided for in case they operated the mines slower than provided for.

It is claimed that this construction of the contract will be unconscionable and will result in compelling the defendant to pay to the plaintiff a larger sum than ten cents per ton royalty.

To the last part of this contention the court must agree, but that it would be unconscionable the court cannot agree, because the parties themselves have expressly provided that under certain conditions the “royalty” or payment will as a matter of fact exceed ten cents per ton for all the coal actually mined; by the contract itself the parties have provided for only one place to which the surplus money may be applied and that is to the coal which is thereafter mined, “in excess of the minimum amount herein provided for.”

The case of *Tod v. Stambaugh*, 37 Ohio St. 469, is quite in point, although the decision discussing the subject-matter is very brief.

The conclusion, therefore, to which this court has come is, that the demurrer to the answer is sustained.

If the defendant does not desire to further plead, a final judgment will be entered; otherwise ten days given in which to amend. Exceptions will be noted.

Dougherty v. Traction Co.

CARRIERS—NEGLIGENCE—STREET RAILWAYS.

[Superior Court of Cincinnati, Special Term, January 2, 1907.]

WILLIAM DOUGHERTY V. CINCINNATI TRAC. CO., ETC.

1. NEGLIGENCE IS THE VIOLATION OR OMISSION OF SOME LEGAL DUTY.

Negligence is not to be inferred from the mere act or omission of one, where he is not shown to have violated a legal duty incumbent upon him.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 1-9.—Ed.]

2. FACTS TO RELIEVE SUSPICION OF CONTRIBUTORY NEGLIGENCE MUST BE PLEADED.

One who attempts to board a street car before it has stopped in response to his signal, is burdened with a suspicion of contributory negligence, to be relieved of which facts must be affirmatively pleaded.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 519-527.—Ed.]

3. RELATION OF CARRIER AND PASSENGER BEGINS, WHEN.

The relation of carrier and passenger, between one hailing a car, intending to take passage thereon, and a street railway company, begins only when the car is stopped at a usual stopping place in response to a signal from an intending passenger.

[For other cases in point, see 2 Cyc. Dig., "Carriers," §§ 438-470; 7 Cyc. Dig., "Street Railways," §§ 476-485.—Ed.]

4. FACTS CONSTITUTING NEGLIGENCE MUST BE PLEADED WITH CERTAINTY.

In an action for injuries resulting from alleged negligence of a street railway company, in starting a car while plaintiff was in the act of boarding same, all of the facts upon which the assumption of negligence is to rest must be pleaded with certainty.

[For other cases in point, see 2 Cyc. Dig., "Carriers," §§ 614-622; 6 Cyc. Dig., "Negligence," §§ 489-513.—Ed.]

[Syllabus approved by the court.]

DEMURRER to petition.

T. R. Snyder and T. L. Michie, for plaintiff.

E. G. Kinkead, for defendant.

HOSEA, J.

The material allegations of the petition, on this demurrer, are, that the plaintiff, at a certain date, at 10:30 P. M., stood at the corner of two streets and hailed a car, intending to become a passenger; that the car, in response to his signal, "slowed down;" that plaintiff took hold of the handle bars and was in the act of stepping upon the rear platform when the car was suddenly started with great speed, whereby he was thrown to the street and injured.

These allegations do not necessarily imply negligence. Under them a condition of fact could be shown, by literal proof under the issue, upon which no negligence whatever might appear, and upon which no inference of negligence could be based. The rule is well established that negligence is not to be inferred from the mere act or omission of the defendant. It must be further shown that in such act or omission the

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defendant violated some legal duty incumbent upon him. Shearman & Redfield, Negligence paragraph 57 and paragraph 15. The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him. *Hayes v. Railway*, 111 U. S. 228 [4 Sup. Ct. Rep. 369; 28 L. Ed. 410]; *Peck v. Batavia*, 32 Barb. 634; *Cusick v. Adams*, 115 N. Y. 55 [21 N. E. Rep. 673; 12 Am. St. Rep. 772].

Taking the facts pleaded, omitting mere conclusions of law, it appears that the particular act charged is, starting the car while plaintiff was in the act of stepping on the same. The plaintiff pleads in the capacity of a passenger, because, as he says, he hailed the car intending to take passage, and the car had slowed down. This is manifestly insufficient. The general rule is, that a contract of passage begins only when the car is stopped at a usual stopping place, in response to a signal from an intending passenger. Obviously the range of pleading admitting exceptions under the rule must be very limited, indeed. The cited cases on that subject use descriptive terms indicating this. To get upon a car in motion, before it is stopped in response to the signal, and more especially at night, necessarily raises a suspicion of contributory negligence. Necessarily, therefore, facts must be pleaded to relieve this suspicion.

The allegations, moreover, do not show the plaintiff was at a crossing or place where cars usually stop to take on or discharge passengers, or at a place where the cars are accustomed to stop generally and without reference to special crossings, on signal. To say that plaintiff stood at the corner of an intersecting street does not imply either of these conditions. Nor is this omission aided by an allegation that the motorman or conductor actually saw the plaintiff in the act of getting on, or even that they saw him at all. The allegation that the car "slowed up" in response to a signal is a conclusion based upon no pleaded fact. It is manifestly a mere assumption. Even the starting of a car from complete stoppage, while one is in the act of getting on, may not imply negligence. *Packard v. Traction Co.* 12 Circ. Dec. 822 (22 R. 578).

Our Supreme Court has repeatedly held that the facts constituting the negligence must be pleaded. For it is not the act or omission of the defendant that is the *gravamen* of the action, but the breach of duty in respect of such act or omission. Negligence, therefore, is not susceptible of direct proof, but must, by the nature of things, be a deduction from proved facts. It follows that the facts and all the facts upon which the assumption of negligence is to rest must be pleaded with certainty. These principles rest upon familiar authority and require no additional citations.

The demurrer is sustained.

State v. Delivery Co.

MONOPOLIES—INDICTMENTS AND INFORMATIONS.

[Hamilton Common Pleas, March 23, 1907.]

STATE OF OHIO V. ICE DELIVERY CO. ET AL.

1. JOINDER OF OFFENSES IN ONE COUNT OF INDICTMENT.

An indictment which charges in one count the commission of several offenses of the same general character, committed at the same time and forming part of the same transaction, is not bad for duplicity.

[For other cases in point, see 5 Cyc. Dig., "Indictments and Informations," §§ 406-428.—Ed.]

2. CHARGING ONE OFFENSE IN SEVERAL WAYS.

An indictment which charges in a single count conjunctively several different ways of committing an offense described in the statute disjunctively, is not bad for duplicity.

3. STATING VENUE IN INDICTMENT AGAINST MONOPOLIES.

In an indictment under the Valentine antitrust act against individuals, firms, partnerships, corporations or associations, or any two or more of them, it is not necessary to aver that the trust or illegal combination exists or does business in the county in which the indictment is formed.

[For other cases in point, see 5 Cyc. Dig., "Indictments and Informations," §§ 51-56.—Ed.]

4. WHAT CONSTITUTES AN OFFENSE UNDER VALENTINE ANTITRUST LAW.

No overt act need be charged in the indictment against the persons, firms, partnerships, corporations or associations mentioned in Sec. 1 of the Valentine act. The mere membership in the illegal combination or trust is sufficient to constitute an offense under said act and in such case the venue of the indictment is the county where such members of said combination reside or exist, without reference to where the trust itself as an entity exists or does business.

[For other cases in point, see 6 Cyc. Dig., "Monopolies," §§ 28-50.—Ed.]

5. SUFFICIENCY AND REQUISITES OF INDICTMENT AGAINST AGENTS OR EMPLOYEES OF A MONOPOLY.

Laning 7589 (B. 4427-4) distinguishes between two classes of persons who may become liable under the act, viz: First, "any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission," and, second, "any person who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or furnish any information to assist in carrying out such purposes or orders thereunder or in pursuance thereof." In an indictment charging any person in the first of said classes with a violation of the act, knowledge need not be averred nor proven, but knowledge must be averred and proven in an indictment against any member of the second class.

[Syllabus by the court.]

H. M. Rulison, F. Morris, L. B. Sawyer and C. O. Rose, for plaintiff:

Indictment bad for duplicity denied. *Hale v. State*, 58 Ohio St. 676, 679 [51 N. E. Rep. 154].

No overt act is necessary to be charged, as the crime of conspiracy is complete with the combination. *Limber v. State*, 28 O. C. C. 761.

Miller Outcalt, Oscar Stoeck, Harmon, Colston, Goldsmith & Hoadly, Paxton & Warrington, Thomas Darby, A. G. Turnipseed and H. L. Gordon, for defendants.

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BROMWELL, J.

The grand jury of Hamilton county returned an indictment against the Ice Delivery Company and the other defendants herein, charging that said defendants—

“On the fifteenth day of June, in the year 1906, with force and arms, at the county of Hamilton aforesaid, were active members of, acted with and in pursuance of, and aided and assisted in carrying out the purposes of an association of persons, firms, partnerships and corporations, the said association being organized for the following purposes, to wit:

“First. To create and carry out restrictions in trade and commerce in ice.

“Second. To increase the price of a certain commodity, to wit, ice.

“Third. To prevent competition in the manufacturing, making, purchase and sale of a certain commodity, to wit, ice.

“Fourth. To fix at a certain standard and figure, whereby the price of ice, an article of merchandise intended for sale, barter, use and consumption in the state of Ohio, to the public and consumer was controlled, then and there, by said association, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.”

To this indictment the defendants have filed a motion to quash on the following grounds, viz.:

“That there are defects upon the face of the record in this, to wit:

“First. Said indictment contains a charge of more than one offense.

“Second. The indictment contains no allegation as to where the alleged association existed.

“Third. The indictment contains no allegation in the first three clauses of purposes named, of any intention to restrict trade, increase the price of, or prevent competition in ice in the state of Ohio.

“Fourth. The indictment fails to show or set forth the manner in which the price of ice was fixed, or controlled.

“Fifth. The indictment contains no allegation of knowledge of the purposes of the association on the part of the defendants, or that any of the defendants performed any act in violation of said section.

“Sixth. Other defects apparent upon the record.”

Under Rev. Stat. 7249 (Lan. 11003), “A motion to quash may be made in all cases where there is a defect apparent upon the face of the record, including defects in the form of the indictment, or in the manner in which an offense is charged.”

It is sometimes difficult to distinguish between proper grounds for a motion to quash and those for a demurrer; but, although the state suggests that some of the grounds alleged in this case might more properly be urged by demurrer than by motion to quash we shall, for the

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purposes of this case, consider all of the reasons set forth in the motion we are considering as being appropriate to that motion and will pass upon them in the order in which they are presented.

1. As to duplicity in the indictment.

The defendant claims that "Said indictment contains a charge of more than one offense, and that it sets out, in one count, the violation of each of the subdivisions of the first section of the so-called Valentine antitrust act," and that by reason thereof, it must be defective for duplicity.

To support this contention defendant cites the case of *State v. Gage*, 72 Ohio St. 210 [73 N. E. Rep. 1078], and particularly, the language of the court in that case as found on page 229.

This was a suit brought under the so-called Valentine-Stewart anti-trust law, 93 O. L. 143, (Lan. 7586 to 7597; B. 4427-1 to 4427-12), being the same act under which the indictment is brought in this case.

The following are the sections of said act involved in the present proceeding:

Laning 7586 (B. 4427-1). "A trust is a combination of [1] capital, [2] skill or [3] acts by two or more [a] persons, [b] firms, [c] partnerships, [d] corporations [e] or associations of persons, or of any two or more of them for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix at any standard or figure * * * any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state," whereby—*i. e.*, by the standard or figure fixed—its price to the public or consumer shall in any manner be controlled or established.

Laning 7589 (B. 4427-4). "Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty (\$50) dollars nor more than five thousand (\$5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense."

Laning 7590 (B. 4427-5). "In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the

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trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created."

Laning 7591 (B. 4427-6). "In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such."

Laning 7594 (B. 4427-9). "That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state."

The indictment against Gage, in *State v. Gage, supra*, page 211, charged that he,

"Said Perley W. Gage, late of said county of Delaware, was an active member of, acted with and in pursuance of, aided and assisted in carrying out the purposes of the Delaware Coal Exchange, an association of persons organized for the purpose of preventing competition in the sale, and to maintain a uniform and graduated figure for the sale of coal, and to directly preclude a free and unrestricted competition among the members of said association, purchasers and consumers in the sale and transportation of coal, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

The defendant demurred to the indictment on the grounds:

First. "That the facts charged do not constitute an offense against the laws of Ohio.

Second. "That the statute under which the indictment was presented is unconstitutional and void."

The demurrer was overruled, plea of guilty entered, sentence of fine and motion of arrest of judgment, which was overruled.

The court decided that the act was constitutional and that the indictment was sufficient to charge the offense.

The question of duplicity was not raised either by motion or demurrer, although the indictment shows that the defendant was charged with being a member of an association * * * organized for the purpose of "preventing competition in the sale of coal"—which charge relates to the third paragraph of Sec. 1 of the act—and also "to maintain a uniform and graduated figure for the sale of coal" which relates to the fifth paragraph, and also "to directly preclude a free and unre-

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stricted competition among the members, etc.," which relates also to the fifth paragraph.

According to the theory of the defense in this case the indictment in *State v. Gage, supra*, was defective because three separate and distinct offenses were charged in one count, one made so by paragraph 3 of the act and the other two by paragraph 5.

But it is a familiar rule of pleading that a demurrer "searches the whole record;" and, as the Supreme Court had this indictment before it on demurrer, it was its duty to, and no doubt it did, examine the indictment for other defects than those alleged especially as ground for demurrer; the fact that the court made no such criticism upon the indictment in that case would seem to be conclusive against the claim of duplicity charged in the present case which resembles the Gage indictment and differs from it only in setting forth four of the methods and purposes of the combination instead of three as in that case.

But we do not have to rely on that case alone in reaching this conclusion. The following citations from Ohio cases seem to make clear the rule as to duplicity in a single count in an indictment.

In the case of *Foster v. State*, 1 Circ. Dec. 261 (1 R. 467), three persons were indicted for three several acts, each of which was a violation of law. But the court held that, as but a single general offense was charged, and the three defendants might have been found guilty either as principals or as aiders and abettors, of each of the offenses, the indictment was not bad for duplicity.

In the case of *Blair v. State*, 3 Circ. Dec. 242 (5 R. 496), the indictment charged defendant with an assault with intent to rob, an attempt to perpetrate a robbery, and with murder, all in one count. A demurrer was filed charging duplicity. The court said, page 245:

"So that, conceding for the sake of argument, that, omitting the alleged independent charge of assault with intent to rob, the indictment sufficiently charges an 'attempt to perpetrate a robbery,' how is plaintiff in error injured by two averments of the same attempt, or two averments of some of the facts amounting to such attempt to rob?

"Not all indictments charging two offenses in one and the same count are bad. *Breese v. State*, 12 Ohio St. 146."

In the case of *State v. Bauer*, 1 Dec. 199 (1 N. P. 103), tried before Judge Evans of this court, two of the counsel for defendants in the present case represented opposite sides. The charge was soliciting a bribe. The language of the indictment was in the conjunctive, *i. e.*, "with respect to his action, vote, opinion, and judgment," while the language of the statute under which it was drawn was in the disjunctive, *i. e.*, "with respect to his action, vote, opinion or judgment."

A motion to quash for duplicity was overruled, the court citing

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Watson v. State, 39 Ohio St. 123; *State v. Conner*, 30 Ohio St. 405; *Mackey v. State*, 3 Ohio St. 363.

In the case of *Mackey v. State*, *supra*, the third syllabus reads as follows:

"An allegation of uttering a 'false, forged, and counterfeited bank note,' is not bad for repugnancy."

Here, according to contention of defendants in this case (and as claimed in the case cited), are three distinct offenses, viz.: uttering a false note, uttering a forged note, and uttering a counterfeit note. It is true that the statement of this case does not inform us whether these three offenses were charged in a single count or in several; but the natural inference from the manner in which they are grouped in the syllabus would be, that they were in a single count. The court did not pass upon the question of duplicity but did upon the question of repugnancy as above.

In the case of *Breese v. State*, 12 Ohio St. 146 [80 Am. Dec. 340], there was but one count which contained a charge of burglary and also a charge of larceny. Demurrer filed for duplicity because the "indictment contains but one count charging two distinct crimes—burglary, a penitentiary offense and larceny, punishable only by fine and imprisonment in the county jail."

The court, while stating the general rule to be, that two distinct crimes or offenses cannot properly be shown in the same count of an indictment, also stated that this rule was by no means of universal application and that one of the exceptions, as well established as the rule itself, is, that a burglary and larceny, committed at the same time, may be thus united. The court thinks that the clause, "committed at the same time," taken in connection with the fact that the two offenses while distinct crimes, grew out of, and formed parts of, the same transaction, is the key to this decision.

In the case of the *State v. Hennessey*, 23 Ohio St. 339 [13 Am. Rep. 253], the syllabus is:

"Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment and the taking thereof charged as one offense."

The indictment was for larceny. The second count charged the stealing of certain articles belonging to one person, and also the stealing of certain other articles belonging to another person, the values being separately stated. The court held as above.

In the case of *State v. Conner*, 30 Ohio St. 405, the first syllabus is as follows:

"Under the act 'to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio' [52 O. L. 153] (2 S. & C. 1431) [4 Curwen 2669; see Rev. Stat. 6940 (Lan. 10589) *et seq.*],

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a count in an indictment charging that the defendant unlawfully, etc., sold intoxicating liquors to one 'being then and there intoxicated and in the habit of getting intoxicated,' defendant knowing, etc., is not bad for duplicity."

This was an indictment in which it was claimed that in the third count two distinct offenses were charged, viz.: That of selling to a person intoxicated and that of selling to a person in the habit of getting intoxicated, and that it was bad for duplicity. The court said, page 406:

"The offense is but a single one. There is but one sale of liquor, and but one person to whom it was sold. The fact that such person represents two characters, under the statute, does not make the offense double. * * * It is universally laid down, that where the offense is thus marked by the disjunctive 'or,' " [in the statute defining it], "the indictment may well charge by substituting 'and.'"

"Bishop, Statutory Crimes Sec. 383, speaking of the alternative crimes, says: 'If an indictment is to be drawn on a statute in alternative clauses, the pleader, as a general rule, * * * may elect to charge no more than constitutes an offense within one clause, or he may proceed upon two clauses, or three, or all, as he deems best, and all in a single count, employing the conjunctive 'and,' when the statute has the disjunctive 'or.'"

In the case of *Jackson v. State*, 39 Ohio St. 37, the first syllabus is as follows:

"A count in an indictment in which the defendant is charged with robbery and with murder while in the commission of the robbery, and in which it is alleged that the blows which caused death were struck by the defendant with a piece of iron, a sledge and a shovel, is not bad for duplicity; the state cannot be required to elect upon a trial on such count, and evidence of the robbery and the use of each of the implements in producing death is admissible."

In the case of *Watson v. State*, 39 Ohio St. 123, the second clause of the syllabus is as follows:

"A single count in such indictment, which charged that B was a member of the house, and also a member of a standing committee of such house to which the bill was referred, and that the offer or promise was made to influence his vote therefor in the house, and his vote for a favorable report thereon in the committee, is not bad for duplicity. The charge thus made constitutes but one offense under the statute."

In the case of *Hale v. State*, 58 Ohio St. 676 [51 N. E. Rep. 154], the first two clauses of the syllabus are as follows:

"1. When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways, as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant.

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"2. An indictment drawn under the act 'to regulate the practice of medicine in the state of Ohio' (92 O. L. 44), which charges that the defendant, without having complied with the provisions of the act, for a fee prescribed, directed, and recommended for the use of a person named, a drug medicine, and agency, put up in a paper box on which he wrote directions to which he signed his name and appended thereto the letters 'M. D.,' is not bad for duplicity."

It was contended in this case (page 679) that as the indictment, in the same count, charged that the accused prescribed a medicine for the use of a person named, and appended the letters "M. D." to his name subscribed to directions written on the package for the use of the medicine, two distinct offenses were charged and the indictment therefore bad for duplicity. The court said, page 679:

"It appears to be a well-settled rule of criminal pleading that, when an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways, as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute, if they are not repugnant; and proof of any one of them will sustain the indictment. This rule is more fully stated in Bishop, New Criminal Procedure Sec. 436, as follows:

" 'A statute often makes punishable the doing of one thing, or another, sometimes specifying a considerable number of things. Then by proper and ordinary construction a person who, in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them.' "

The court further said, page 680:

"Nor is this indictment open to the objection of duplicity because it charges that the defendant prescribed, directed and recommended the remedy, and describes the latter as a drug, medicine and agency for the treatment, cure and relief of a wound, fracture and bodily injury, although the statute is in the alternative, and makes it an offense to do either of the things mentioned; for they are not repugnant, and all of them may occur in the same transaction, constituting but one offense. Upon this principle it was held that where a statute made it a crime to use instruments, or administer drugs, to produce an abortion, an indictment drawn on it, was not double which charged that both of those means were employed by the defendant in the commission of the offense. *Commonwealth v. Brown*, 80 Mass. (14 Gray) 419. And under a statute which prohibited the unlicensed sale of rum, brandy, whiskey

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or gin, it was held proper to charge, in a single count, the sale of all these various kinds of liquors. *Rawson v. State*, 19 Conn. 292. Numerous cases are found in the books in which indictments so drawn on alternative statutes, have been sustained. Bishop, Statutory Crimes Sec. 244, 383; Bishop, New Criminal Procedure Sec. 586."

In the case of *Smith v. State*, 59 Ohio St. 350 [52 N. E. Rep. 826], the first syllabus is as follows:

"An indictment which charges that the accused on a specified day received and concealed different chattels which had been stolen from different owners, is not bad for duplicity."

The first sentence of the fourth syllabus draws a distinction between offenses growing out of the same transaction at the same time, referred to in the first clause of the syllabus, and different offenses at different times growing out of different transactions. It reads as follows:

"Receiving or concealing different articles of property at different times and on separate occasions, constitutes distinct offenses and cannot be prosecuted as one crime, though all the property be thereafter found in the possession of the defendant at one time and place."

In the case of the *State v. Inskeep*, 49 Ohio St. 228 [34 N. E. Rep. 720], the defendant was indicted for making an assault and also for striking and wounding. The trial court sustained a motion to quash on the ground that it contained but one count and two separate and distinct offenses. This was reversed by the Supreme Court, which held that,

"The indictment is not bad for duplicity and is in proper form."

In the case of *Gordon v. State*, 46 Ohio St. 607 [23 N. E. Rep. 63; 6 L. R. A. 749], the court, on page 626, said:

"No matters, however multifarious, will operate to make a declaration or information double, provided, that all taken together, constitute but one connected charge, or one transaction." A man may, accordingly, be indicted for the battery of two or more persons in the same count; or for a libel upon two or more persons, when the publication is one single act; or for selling liquor to two or more persons without rendering the count bad for duplicity."

The indictment in this case charged that defendant unlawfully sold intoxicating liquors, other than cider, * * * to be used as a beverage, to divers persons whose names to the jurors were unknown * * *, following almost exactly the language of the statute defining the offense. Defendant claimed that it was bad for duplicity in charging several different offenses in a single count. The court ruled otherwise as above.

See also *State v. Sparks*, 1 Dec. 275 (31 Bull. 84).

The language of the Supreme Court in *State v. Gage*, *supra*, page 230, cited by defendant, must be taken in connection with the subject it was then passing upon. The claim had been made that the entire act

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was indivisible and was to be construed as a whole; that certain sections of it, viz., Secs. 4, 5, 6 and 7, were unconstitutional and if that were true the entire act was tainted and of no validity. It was in connection with these sections and this claim of unconstitutionality that the court said:

"The case, therefore, offers no opportunity for the application of the principle * * * that where an act contains an indivisible proposition whose terms include contracts which the legislature is powerless to prohibit the courts cannot save the act by restricting the natural and obvious meaning of its terms."

That the court in this case would go beyond the two grounds urged by the plaintiff in error and search the indictment for any other defect is sustained by the case of *Reed v. State*, 15 Ohio 217, 222, where Judge Wood says:

"For, while in civil cases we are not astute in searching for errors not expressly raised on the record, but consider our duty as discharged when we dispose of the case made by those who represent the parties in interest, in criminal prosecutions a different rule prevails. The court, then, in the administration of criminal justice, are, at least, *quasi* counsel for the accused; and, in revising the proceedings of an inferior tribunal, will overlook no substantial defect in the record, though not expressly assigned, any more than permit on trial an improper conviction to be obtained by false issues presented through the forms of pleading, and by the unskillfulness of counsel."

I have gone thus fully into the question of duplicity, not because it seems to be directly involved in the case under consideration but because of the stress laid upon it by counsel for defendant in support of the motion. The indictment and the statute being read in the light of the foregoing decisions would seem beyond a doubt to set up but one offense charged in the indictment, viz.: That defendants "were active members of, acted with and in pursuance of, and aided and assisted in carrying out the purposes of an association, etc."

The court therefore finds the claim of defendant that the indictment is bad for duplicity is not well taken.

2. The second reason urged by defendant as a ground to quash is that "The indictment contains no allegation as to where the alleged association existed."

In considering this alleged defect in the indictment it seems sufficient to call attention to the fact that the *locus* of the association or combination is not prescribed, fixed by or in any manner referred to in the statute itself, and so far as anything appears in the law, it is entirely immaterial where the trust or combination itself exists, whether in Ohio or outside of Ohio.

Section 5 of the act (93 O. L. 144), provides that it shall be unnecessary in any indictment brought under this act to give the name

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or description of the trust or combination or to state how, when or where, it was created. It does not, in so many words, say that it shall be unnecessary to set out where such trust or combination is located and doing business at the time charged in the indictment, but as this is a collateral fact and not the gist of the offense charged, is it not reasonable to presume that the word "description" as used in the act is sufficiently explicit and broad enough to cover as a part of the description the place where the trust or combination exists? In support of this inference we again call attention to the Gage case, in which the indictment was similar to the one under consideration in that it contained no averment as to the place where the trust or combination of which the defendant was a member existed or did business, and again we may well assume that in searching the record for errors in that case the Supreme Court would have detected this omission if it were error as claimed.

It must be remembered that this indictment is not against the trust or combination as an entity; if it were, the venue of such indictment would probably be the county where said trust or combination carried on its business or committed some overt act in violation of the law and this venue would have to appear in the indictment. But the offense charged in the indictment before us is against the individual members of the combination and not against the combination itself and the individual members are not charged with overt acts unless, indeed, the language that they "aided and assisted in carrying out the purposes" of said combination constituted an overt act.

But even with such an assumption this language might be construed as redundant and there would still be enough left in the indictment properly to charge an offense against the law.

The act does not require the charging of any overt act. The mere passive condition of being members of the trust or combination is all that is required and the venue of this indictment is the place where these defendants individually, and not as a trust or combination taken as a whole, were existing or residing at the time they were active members of said combination; or acted with said combination or aided or assisted in carrying out its purposes, and this venue is plainly charged in the indictment to be Hamilton county, Ohio.

If it should appear on the trial of this cause that any one or more of the defendants were not residing or existing in Hamilton county, Ohio, at the time of the alleged offense such fact might be pleaded as a defense for such nonresidence; but that is a matter that cannot be set up in a motion to quash, which goes only to defects apparent upon the record and no such defect as to the venue of any of the defendants appears in the indictment but, on the contrary, is expressly averred.

In the case of *State v. Dangler*, 74 Ohio St. 49, where the offense charged was the failure of a child to support his parent and where the

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evidence showed that the former resided in one county and the latter in a different county and also showed that the defendant had not been present in the county of the parent during the time laid in the indictment, the court found that the venue of the indictment was that of the child and not that of the parent. Here was no overt act but only a passive offense of failing to perform the duty of giving support. The court said, page 51:

"Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, *venue* must be laid as in the county of the offense. * * * An offense is committed in that county in which the acts constituting the same are done. * * * This statute defines and prescribes but a single offense; that of nonsupport of a parent; and it is the act of the child in failing to support * * * that constitutes the offense."

We agree with counsel for defendants that the legislature of Ohio "has no extraterritorial jurisdiction" and that the offense must be laid in the indictment as having been committed in Ohio and, generally, in the county where the offense was committed. But this statement of the law of venue has no application in this case for the reasons already given. We do not agree with them in the inference that the act under consideration "could relate only to combinations organized and existing within the state of Ohio." Section 5 of the act expressly dispenses with the necessity of stating how, when or where such trust or combination is created.

Granting that the title of the act casts light upon the intention of the legislature in framing the law, we still cannot agree with the defendants that the title in this case limits the provisions of the act to membership in Ohio trusts or combinations. The title is in the following words:

"An act to define trusts and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state."

While we recognize, under the opinion of the Supreme Court, in the case of *Burgett v. Burgett*, 1 Ohio 480 [13 Am. Dec. 634], and *State v. Pugh*, 43 Ohio St. 98, 113 [1 N. E. Rep. 439], the rule that the title may be read, as explanatory of any doubtful matter in the act itself, it does not seem to us that there is anything doubtful in the meaning of the act which requires explanation or that there is any inconsistency between the language of the title and the purposes of the act.

Sutherland, Stat. Constr. Sec. 339, says:

"But the title cannot enlarge or confer powers, control the plain words of the act, or extend the purview to objects mentioned in the

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title but not in the act. Where the text of the statute is plain and unambiguous, the title cannot have the effect to modify it."

The last clause of this title states one of the purposes of the act to be, "to promote free competition in commerce and all classes of business in the state," and this is the only clause in the title which limits the scope of any of the purposes of the act to the state of Ohio. It does not set forth that this act is to define trusts created or existing in Ohio; it does not limit its penalties and punishments to Ohio corporations or associations, for Sec. 3 of the act contains a special provision against foreign corporations and associations violating its provisions.

If there were any doubt whatever upon the applicability of the act to foreign corporations, trusts or combinations, Sec. 12, defining the meaning of the word "persons," wherever it appears in the act, says that it shall include "corporations, partnerships and associations existing under or authorized by the state of Ohio, or any other state, or any foreign country." Substituting these last words in place of the word "person" or "persons" where they occur in the act, makes it evident that the contention of defendant upon the point raised in its second objection to the indictment is not well taken.

3. The third claim advanced by defendant is, that

"The indictment contains no allegation in the first three clauses of purposes named, of any intention to restrict trade, increase the price of, or prevent competition in ice in the state of Ohio."

If we are correct in our interpretation of the legislative intent, there is in the act no limitation upon the first three purposes set forth in Sec. 1 (93 O. L. 143), to Ohio trusts and combinations. Such combinations as have the purpose to do the things set forth in these three sections are declared to be trusts under our law, no matter whether the purposes are to be carried out in Ohio or outside of this state. The allegation or averment in the indictment that the illegal combination is formed to do these things in Ohio is dispensed with by the statute itself in Secs. 4, 5 and 12.

The fourth clause of the first section "fixing at a standard or figure, etc.," closes with the clause "in this state." This clause would undoubtedly require that the averment in the indictment which recites this fourth clause as one of the purposes of the trust or combination should set out that the purposes contained in said clause were to be carried out in the state of Ohio and that averment is found in the indictment in this case. This last statement is made applicable to a case where the purpose is that contained in the fourth clause alone.

But the indictment in this case goes further than that and places the venue of these purposes in Hamilton county, Ohio, the semicolon at the end of each of the first three sections being only an abbreviated form of the word "and" and all of the causes being connected up into one continuous sentence by that means.

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It may well be construed that it was the intention of the legislature to have this clause "in this state" apply to the first three purposes as well as the fourth, it being omitted only in order to avoid tautology.

Incidentally we might say that even if this objection made by defendant to the first three clauses in the indictment as not alleging venue were tenable, which we do not think to be the case for the reasons given above, yet they might be rejected as surplusage and, the fourth clause being free from this infirmity, if it is one, would save the indictment from being quashed.

Recurring again to the Gage case, we call attention to the fact that the indictment in that case and this are identical in omitting the clauses fixing venue which defendants claim should have been contained in the present indictment and again assuming that the Supreme Court in the Gage case found no objection, we must conclude that the claim of defendants upon this point is not well taken.

4. The next contention of defendants is, that

"The indictment fails to show or set forth the manner in which the price of ice was fixed or controlled."

It might be sufficient to say that the price of ice was not fixed nor controlled by the defendants in this case, whatever may have been done by the trust or combination to which they are alleged to belong. In the view which we have already expressed as to the proper construction of this act, there are but three elements necessary to constitute the offense charged in the indictment, viz.:

First. Was there an ice trust, as defined by the act?

Second. Were defendants members of that trust?

Third. Were defendants, at the time of the alleged offense, residents of or existing in Hamilton county, Ohio?

Whether the trust did or did not carry out any, a part or all of the purposes referred to, or the manner in which it carried any or all of them out by overt acts is entirely immaterial. The fact that the indictment does not aver the particular manner in which the trust controlled the price of ice or the means by which it proposed to do so does not, in view of the language of Sec. 5 (93 O. L. 144), viz.: "In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination," make it defective.

If we construe the law correctly, it is not necessary for the trust to do any overt act beyond the organization of the conspiracy or combination, nor for the individual members of the trust to do anything more than to be a member of it. Of course, overt acts may be done by both; but for the purposes of this case no overt act needed to be alleged to make out the offense.

Again we refer to *State v. Gage*, *supra*, in support of our belief that this objection to the indictment is not well founded.

5. The next claim of defendants is that

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"The indictment contains no allegation of knowledge of the purposes of the association on the part of the defendants or that any of the defendants performed any act in violation of said section."

This objection raises the question of knowledge and overt acts. As to overt acts, we may repeat what we have previously called attention to—that the gist of the offense charged in this indictment is the conspiracy. It is well settled that in cases of conspiracy, while overt acts may be averred and proven they are not required to be, as a rule. Especially is that true where the conspiracy is made an offense as in this case by a statute which sets forth all the essential elements of the offense.

In the case of *Needles v. Bishop*, 14 Dec. 445, which was a suit under the Valentine act, the second and third clauses of the syllabus are as follows:

"A common-law unlawful combination tending to create a monopoly and restrain trade, contrary to public policy, is pleaded in a petition which avers that defendants are the only persons in the particular city engaged as jobbers furnishing plumbers' supplies; that defendants have combined and conspired together by uniting their capital, labor and skill for the purposes of limiting the production of such supplies, and increasing the purchase price thereof to persons not members of the association; that defendants have agreed neither to sell below a certain schedule of prices, sell to any person not a member of the association, nor sell supplies to be used in any building or structure not being plumbed or furnished with plumbing supplies by some member of the association; that they have agreed not to compete with each other in furnishing supplies, or in plumbing buildings; that they will not sell supplies to any person unless some member of the association is employed to furnish the labor to install the plumbing supplies in the building for which they are furnished; and that such combination is formed to enhance the price of supplies without regard to their cost. Plaintiff is entitled, under such petition, to recover whatever damages he has sustained as a direct result of such unlawful combination."

"Evil intent or actual injury to the public need not be shown to render trade combinations void as against public policy. The test of illegality is their tendency to endanger the public, whether or not their necessary consequence is to control prices, limit production and suppress competition in a manner to restrain trade, and create a monopoly."

In 2 McClain, Crim. Law Sec. 966, we find the following:

"The crime" [conspiracy] "consists in the unlawful combination and not in what is done toward carrying out such combination, and the crime is completed when the conspiracy is entered into although no act done in pursuance thereof is committed"—citing in footnote a large number of cases.

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Also from the same section we cite the following:

"A conspiracy to do an unlawful act is a separate and distinct offense from that of the act itself, and is to be governed in its prosecution by the provisions relating to conspiracies and not those relating to the specific offense. * * * Indeed, it is not necessary that the overt act be the completed purpose intended to be accomplished by the combination, and it may be done outside the jurisdiction of the court in which the conspiracy is prosecuted."

Section 972, same work, might have been cited in connection with the previous discussion upon the subject of venue, but is here inserted as reflecting upon the general rule governing conspiracies.

"Section 972. The venue of the offense is either where the conspiracy is formed or where the overt act thereunder is done. * * * It seems also that the offense is punishable where the conspiracy is entered into, although it contemplates the doing of a wrongful act elsewhere." Citing *Wolf, In re*, 27 Fed. Rep. 606, and *Bloomer v. State*, 48 Md. 521.

Section 977, of the same work says:

"From what has already been said in regard to an overt act, it is plain that it is not necessary to charge anything that is done in pursuance of the conspiracy except where, by statute an overt act is required. If the indictment alleges substantially the facts necessary to show a conspiracy, no act done or injury suffered in consequence thereof need be charged."

There is but one place in the entire act under consideration where the *scienter* or knowledge of the unlawful act is required and that is in Sec. 4. This section groups offenders against the act into two classes. The first commit the offense by doing certain acts whether knowingly or not, and the second class must have the guilty knowledge before they can be considered as violating the law. Let us separate these groups so as to discover whether the defendants, if guilty as charged, are described in either group and if so in which one.

The language which describes the first group is as follows:

"Any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission."

This refers to the constituents or members who form the component parts of the combination and furnish the capital, skill or acts referred to in the first section. The very fact of their engaging in the conspiracy creates a presumption of knowledge of the purposes for which it was formed and dispenses with the averment or proof of knowledge. We doubt, however, whether actual ignorance of such purposes could be proven as a defense upon the trial of the charge.

The second group is described as follows:

"Any person * * * who shall, as principal, manager, director,

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agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof."

In this group the knowledge of the wrongful act is material, is set out in the statute and must be averred in the indictment. The persons described in this second group are the active factors or servants, speaking broadly, of the combination, who put into operation the machinery of the trust to carry out its purposes, as distinguished from the more passive persons described in the first group who, while members of the trust, have no active connection with the management of its business.

Counsel for the defendants argue that the word "knowingly" in this section relates back and attaches to the first group as well as the second. If that were the intent, its natural position in the statute would be in the third line instead of the sixth and the section would read, "Any person who knowingly may become engaged, etc."

This would be the grammatical and rhetorical location of the word "knowingly" if the intent of the legislature had been as suggested by defendants, and the fact that it is thus detached would seem to be conclusive that it was to refer to the second group only.

The indictment in the present case, by its averment, puts the defendants in the first group where knowledge is not made a material or essential part of the offense and, as it would not require proof, so it need not be averred in the indictment.

The right of the legislature to pass laws making acts criminal, regardless of the knowledge or intent of the persons who may be accused of committing them, is well recognized. While there has been an extended discussion as to whether, when the act itself which describes the offense does not make knowledge a requisite part thereof, it must, nevertheless, be averred in the indictment and be proven on the trial, it is quite certain that in certain classes of offenses the act may dispense with knowledge as one of its essential elements. This is particularly the case with acts under the police power; acts for the preservation of health; to prevent food adulteration and defining offenses against public policy.

The cases cited by counsel for defendants, in which knowledge was required to be averred in the indictment, all involved as a necessary ingredient of the crime, from its very nature, a knowledge of the unlawful character of the act done and an intent, nevertheless, to carry it out. Thus the case of *Drake v. State*, 19 Ohio St. 211, was a forgery case; the cases of *Fouts v. State*, 8 Ohio St. 98; *Jones v. State*, 51 Ohio St. 331 [38 N. E. Rep. 79]; *Kain v. State*, 8 Ohio St. 306; *Hagan v. State*, 10 Ohio St. 459, were all murder cases; the case of *Mann v. State*, 47 Ohio St. 556 [26 N. E. Rep. 226; 11 L. R. A. 656], decided that

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"punishable by law" was not sufficient in describing the offense of administering poison to two colts, etc. The law, Rev. Stat. 6851 (Lan. 10459), made malice, (which implies knowledge and intent) as an essential to the crime described in said act. All the cases cited involved offenses in which malice or wicked intent and knowledge were necessarily essential elements.

But, as above stated, there are other classes of offenses which relate to the health, public policy, and similar subjects which have been created by the legislature in which the element of knowledge has been dispensed with and for the commission of which the accused will be held responsible, although he may, at the time of the offense, have been entirely ignorant that he was violating the law.

A collection of these cases, under the food adulteration and similar statutes, is found elaborately discussed in the case of *State v. Fromer*, 6 Dec. 374 (7 N. P. 172); also in the case of *Altschul v. State*, 4 Circ. Dec. 402, 405 (8 R. 214), in the course of which reference is made to the following citation from Bishop, Statutory Crimes Sec. 1022:

"Where the statute is silent as to the defendant's intent and knowledge, the indictment need not allege, or the government's evidence show, that he knew the fact; his being misled concerning it is matter for him to set up in the defense and prove."

In the case of *State v. Kelly*, 54 Ohio St. 166 [43 N. E. Rep. 163], which involved the sale of an adulterated food product, the statute did not make knowledge of the adulteration an element in this crime. The second syllabus of the decision is as follows:

"2. In a prosecution under said act it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale."

The court, on page 179, of this case, said:

"If this statute had imposed upon the state the burden of proving the purpose of the vendor in selling an article of food or his knowledge of its adulteration, it would thereby have defeated its declared purpose. Since it is the duty of courts to so construe doubtful statutes as to give effect to the purpose of the legislature, they cannot in case of a statute whose provisions are unambiguous and whose validity is clear, defeat its purpose by construction.

"The correct view of statutes of this general nature is stated by the supreme court of Massachusetts in *Commonwealth v. Murphy*, 165 Mass. 66 [42 N. E. Rep. 504; 30 L. R. A. 734; 52 Am. St. Rep. 496]. 'Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon everyone the burden of finding out

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whether his contemplated act is prohibited, and of refraining from it if it is.' "

See also the case of *Mitchell v. State*, 11 Circ. Dec. 446 (21 R. 24), where a very full discussion of the subject is given.

One of the latest decided cases on this point is that of *Studer v. State*, 29 O. C. C. 33, where the offense charged was procuration. The court decided that in the indictment charging the offense, where the girl solicited was less than eighteen years of age it was not necessary to aver that the defendant had knowledge of her age. This case was afterwards affirmed without report by the Supreme Court.

See also the second syllabus in the case of *Bissman v. State*, 6 Circ. Dec. 712 (9 R. 714), a food adulteration case.

The case of the *State v. Ross*, 16 Dec. 704, was a prosecution under the Valentine act for conspiracy involving restrictions on furnishing fire insurance. In this case the same claim was made on demurrer that because the intent was not averred in the first two counts of the indictment and that such intent was necessary to make out the offense, the indictment was bad. This contention was abandoned, however, before the court passed upon the case.

The case of *State v. Bridge Co.* 28 O. C. C. 147, was a quo warranto proceeding to oust the defendants for violation of this same Valentine act. The first two paragraphs of the syllabus relate to the venue and decide that suit may be brought in any county where any one or more of the defendant corporations forming the trust is situated or has a place of business, or may be brought in any county where the trust itself does business as a separate entity.

Once more, and finally, we call attention to the fact that upon this question of knowledge and overt act *State v. Gage*, *supra*, is on all fours with the present as to the form of the indictment and must be conclusive upon this point for the reasons heretofore stated.

While we recognize the well-established principle that an indictment should aver with certainty the nature of the offense charged so that defendant may have opportunity to prepare his defense and to be entitled to the claim of former jeopardy in case of conviction, we also desire to call attention to the fact that the certainty which is required in the indictment is only certainty to a common intent. *Carper v. State*, 27 Ohio St. 572; *Roberts v. State*, 32 Ohio St. 171, 172.

We are of the opinion that the indictment in this case sets forth with sufficient certainty the offense charged as to protect the defendants.

In conclusion, having carefully and as thoroughly as is possible in the limited time at our disposal examined the various grounds urged by defendants for quashing the indictment and the authorities cited in support of their contention and finding the same not well taken, especially in view of the rule that a motion to quash should not be

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granted except upon the most convincing proof that it has good reasons to support it, the court overrules the motion to quash the indictment.

Unless counsel wish to advance cause for demurrer in addition to those which have been considered in connection with the motion to quash, counsel may, as a matter of form, if they so desire, file their demurrer upon the same grounds and the court will, without further argument, overrule said demurrer.

After the giving of this decision all of the defendants except three pleaded guilty and were fined \$100 each: two of the cases were nollied and the remaining one remains undisposed of.

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ASSESSMENTS—STREET IMPROVEMENT.

[Cuyahoga Common Pleas, February 26, 1907.]

WM. H. MONROE ET AL. V. CLEVELAND (CITY) ET AL.

ACQUIESCENCE OF IMPROVEMENT ESTOPS RIGHT TO ATTACK VALIDITY OF ASSESSMENT.

Abutting owners who silently stand by and permit street improvements to be made, and pay several installments of the assessment levied for the payment thereof, are estopped to deny the validity and regularity of the assessment proceedings.

[For other cases in point, see 1 Cyc. Dig., "Assessments," §§ 544-599; 4 Cyc. Dig., "Estoppel," §§ 45-60.—Ed.]

[Syllabus approved by the court.]

William Howell and Deutsch, Howells & Grossman, for plaintiffs:

Cited and commented on the following authorities. *Toledo v. Marlow*, 28 O. C. C. 298; *Cincinnati v. Seasingood*, 46 Ohio St. 296 [21 N. E. Rep. 630]; *Squier v. Cincinnati*, 3 Circ. Dec. 196 (5 R. 400); *Raymond v. Cleveland*, 42 Ohio St. 522; *Ehni v. Columbus*, 2 Circ. Dec. 283 (3 R. 493); *Wright v. Thomas*, 26 Ohio St. 346; *Stephan v. Daniels*, 27 Ohio St. 527; *Columbus v. Agler*, 44 Ohio St. 485 [8 N. E. Rep. 302]; *Birdseye v. Clyde*, 61 Ohio St. 27 [55 N. E. Rep. 169]; *Lewis v. Symmes*, 61 Ohio St. 471 [56 N. E. Rep. 194; 76 Am. St. Rep. 428]; *Hays v. Cincinnati*, 62 Ohio St. 116 [56 N. E. Rep. 658]; *Walsh v. Barron*, 61 Ohio St. 15 [55 N. E. Rep. 164; 76 Am. St. Rep. 354]; *Cincinnati v. James*, 55 Ohio St. 180 [44 N. E. Rep. 925]; *Metcalf v. Carter*, 10 Circ. Dec. 269 (19 R. 196); *State v. Mitchell*, 31 Ohio St. 592; *Tone v. Columbus*, 39 Ohio St. 281 [48 Am. Rep. 438].

Baker, Wilcox, Payer, Wilkins & Carey, city solicitors, for defendants:

BEACOM, J.

This case involves large amounts of assessments made in this city against abutting owners for improvements made for paving streets. It relates to certain property in the vicinity of Woodland Hills. The facts are, substantially, that in 1903 a declaratory resolution was passed by the council, declaring the intention to improve the streets and the intention to levy assessments upon the abutting property to pay therefor. At that time the statutes of the state allowed the assessment of an amount not exceeding 33 1-3 per cent of the tax valuation of the abutting property. It was discovered by the city authorities that the improvement could not be paid for by such an assessment, and after the declaratory resolution had been passed and the ordinance to improve had gone through the council and the notices required by statute had been given to the property owners, the city did nothing for a

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period of time. Subsequently, some time in the early part of 1904, the legislature passed a statute allowing the assessment of 33 1-3 per cent upon the value of the property after the improvement had been made, which was manifestly a much greater power to assess than was given by the old statute. The city, then, without passing a new declaratory resolution and without further notice to abutting owners, proceeded to pass an ordinance to improve, repealing the old ordinance, and to make an assessment very much in excess of what could have been made under the old statute, and to take the other necessary steps in order to carry out the improvement and to levy an assessment to pay therefor. In addition to that, bonds were issued by the city to pay therefor. In addition to all this legislation and the required notices of the legislation published in the official organ of the city, the notice that the assessment was on file in the engineer's office was advertised in the Recorder, the World, the Plain Dealer and the Waechter und Anzeiger, all newspapers of large circulation, the city seeking not only to fulfill the requirements of the statutes in regard to publication, but endeavoring to give actual notice.

It is admitted by the city that the Supreme Court has held that the beginnings of legislation made in 1903 could not be carried on by the proceedings by which the city proceeded to carry it on in 1904; that it would have to begin *de novo*, or at least give the notice required in a proceeding of this kind, which is a proceeding to take away people's property. That can only be done by due process of law, and one of the things necessary to be done is, that the party be notified of what is intended so that he may come in and object and have, as it were, his day in court.

The city, substantially admitting that the legislation is insufficient, claims that plaintiffs are estopped. It says that not only was this legislation passed and published as I have mentioned, but that each and every one of these plaintiffs came in December, 1904, and paid an installment of this assessment, and again in June, 1905, and paid another installment, and again in December, 1905, and paid a third installment; that the physical improvements were made in 1905, were finished late in the fall of that year, and that in June, 1906, the concrete having been laid in the street, the brick pavement having been laid in the street, the improvement having been made, the abutting property having had the benefit of \$114,000 expended there, instead of in June, 1906, paying to the treasurer the fourth installment, the petitioners filed in the clerk's office a petition, asking the court to restrain the treasurer from collecting any further installments of this assessment. These are undisputed facts. The city says the petitioners are estopped from coming in now.

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It is, of course, true that people who do not speak when they should will not be heard to speak when they would. That is morals, and what is morals is generally law, and that is law. The city says that these people by sitting silent and not protesting but by coming in and paying the first, second and third installments thereby said in substance by their conduct, "We are satisfied that this improvement shall go on, and we expect to pay therefor."

The court makes but one finding of fact: The court finds that after all these things had been done, this legislation passed, these notices published in the newspapers, all the things done which I have in part enumerated and which I do not need to enumerate in full, these plaintiffs did know that they were expected to pay for that improvement and to pay for it according to the assessment levied on them in 1904.

In *State v. Van Horne*, 7 Ohio St. 327, certain taxpayers in a township attempted to enjoin the levying of taxes for the payment of bonds given to a railroad. The Supreme Court said that the legislation authorizing the issue of the bonds was invalid but that the taxpayers had allowed them to be sold and had paid the interest for four years, thereby saying to innocent purchasers that they were satisfied with them, and that they could not now be heard to speak. The court said they could not blow hot to get the bondholders' money and then blow cold to rid themselves of the obligation to repay.

In *Upton v. Oviatt*, 24 Ohio St. 232, the advertisement for bids for doing the work had not been made as required by statute. The Supreme Court held, however, that persons who remained silent and knowingly permitted public moneys to be expended for making the improvement could not be heard to complain but were estopped from making this defense.

Likewise, in *State v. Mitchell*, 31 Ohio St. 592, it was held that legislation for the improvement of High street, Columbus, was invalid, unconstitutional and void, but that the persons who had petitioned for the improvement were estopped from denying the validity of the assessment.

In *Tone v. Columbus*, 39 Ohio St. 281 [48 Am. Rep. 438], also a High street, Columbus, case, the substance of that voluminous opinion is indicated by Judge Okey in a dissenting opinion. He says, page 311: "I do not concur in the view that, in a case like this, there can be an estoppel by silence." The majority of the court had held that not only were those bound who affirmatively petitioned for the improvement but also those who sat silent and allowed it to go on.

In *Columbus v. Sohl*, 44 Ohio St. 479 [8 N. E. Rep. 299], also one of the High street, Columbus cases, the court say in substance that it

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makes no difference what kind of legislation has been passed; that if people know what is going on and know what they are expected to pay if they remain silent they must pay. The court says, on page 282:

"The rights of all parties, including the city, are to be determined by the law of contract and agency."

In *Columbus, v. Alger*, 44 Ohio St. 485 [8 N. E. Rep. 302], relied on by plaintiffs, the court affirms the judgment of the lower court, but I cannot discover what the judgment of the lower court was.

In this city, about 1889, Bond street was paved, and Clinton D. French owned a large frontage there. He allowed the bonds to be sold and he paid three assessments, and got the pavement laid in front of his property, and then sought to enjoin the assessments. About 1902 the case was tried in this court. All there was to the city's case was to ask French on the witness stand whether or not during the summer when the improvement was made he lived on Bond street. He answered "Yes." The city rested its case solely on that, paying no attention to alleged irregularity. The case was decided in favor of the city, and French paid the money.

I assume that the legislation in this present case was irregular. I don't mean to say that it was so. But the court is of opinion that all of these plaintiffs did know that they were expected to pay under the assessment of 1904, and that after coming in and paying until the improvement was made and then ceasing to pay and attempting to enjoin, it would be unconscionable to permit them to do so. They have had \$114,000, the money of their neighbors, to improve their own land. The improvement was very valuable to the abutting owners, the plaintiffs. Each remained silent until it was made. These people got the property of their neighbors for the improvement of their private property, and now pay day has come and they must pay. To permit them now to refuse to pay after this improvement has been made would be to permit them to perpetrate a fraud. Injunction refused. Petition dismissed.

Bank Co. v. Pottery Co.

BILLS AND NOTES—INDORSER'S LIABILITY.

[Summit Common Pleas, March 14, 1907.]

DOLLAR SAV. BANK CO. V. BARBERTON POTTERY CO. ET AL.

INDORSER OF NOTE IN BLANK LIABLE AS AN INDORSER.

One who places his signature in blank upon a promissory note before delivery is an indorser; and, if not within the exceptions of Rev. Stat. 3175f (Lan. 5012), cannot be charged for the nonpayment of the note unless presentment for payment has been made to the maker, at maturity.

[For other cases in point, see 1 Cyc. Dig., "Bills, Notes & Checks," §§ 1057-1093.—Ed.]

[Syllabus approved by the court.]

Grant & Whitmore, for plaintiff:

Plea of payment is not good against the demurrer. *Brown v. Gimm*, 10 Circ. Dec. 538 (19 R. 660); *Weller Co. v. Gordon*, 24 O. C. C. 407; *Hauenschild v. Coffin Co.* 10 Dec. 536 (8 N. P. 124); *Fleig v. Sleet*, 43 Ohio St. 53 [1 N. E. Rep. 24; 54 Am. Rep. 800]; *Hall v. Paving Co.* 3 Dec. 218 (2 N. P. 71).

Extension of time. *Bright v. Carpenter*, 9 Ohio 139 [34 Am. Dec. 432]; *Champion v. Griffith*, 13 Ohio 228; *Robinson v. Abell*, 17 Ohio 36; *Seymour v. Mickey*, 15 Ohio St. 515; *Ewan v. Brooks-Waterfield Co.* 55 Ohio St. 596 [45 N. E. Rep. 1094; 35 L. R. A. 786; 60 Am. St. Rep. 719]; *Quimby v. Varnum*, 190 Mass. 211 [76 N. E. Rep. 671]; *Rouse v. Wooten*, 140 N. C. 557 [53 S. E. Rep. 430]; *Rockfield v. Bank*, 28 O. C. C. 720.

G. M. Anderson, for defendants:

Cited and commented upon by the following authorities. *Whitmore v. Nickerson*, 125 Mass. 496 [28 Am. Rep. 257]; *Holmes v. Sinclair*, 19 Ill. 71; *Rice v. Gove*, 39 Mass. (22 Pick.) 158 [33 Am. Dec. 724]; 1 Daniel, Neg. Instr. 117, Sec. 94; *First Nat. Bank v. Fowler*, 36 Ohio St. 524 [38 Am. Rep. 610]; *Ewan v. Brooks-Waterfield Co.* 55 Ohio St. 596 [45 N. E. Rep. 1094; 35 L. R. A. 786; 60 Am. St. Rep. 719]; *McComb v. Kittridge*, 14 Ohio 348; *Blazer v. Bundy*, 15 Ohio St. 57; *Wood v. Newkirk*, 15 Ohio St. 295; *Faucett v. Meeker*, 31 Ohio St. 634; *Gifford v. Allen*, 44 Mass. (3 Metc.) 255; *Crossman v. Wohlleben*, 90 Ill. 537; *Kane v. Cortesy*, 100 N. Y. 132 (2 N. E. Rep. 874); *Smith v. Pearson*, 53 Cal. 339; *Warner v. Campbell*, 26 Ill. 279, 282 [81 Am. Dec. 307]; *Hamilton v. Prouty*, 50 Wis. 592 [36 Am. Rep. 866]; *Moor v. Folsom*, 14 Minn. 340 [100 Am. Dec. 227]; *Hall v. Cole*, 4 Ad. & Ell. 577; *Duble v. Railway*, 3 Dec. Re. 346; *Lockwood v. Crawford*, 18 Conn. 261; *Pierce v. Whitney*, 22 Me. 113; *Bank of Hortan v. Brooks*, 64 Kan. 285 [67 Pac. Rep. 860]; *Bishop, In re*, 195 Pa. St. 85 [45 Atl. Rep. 582]; *Farmers & Mech. Bank v. Kercheval*, 2 Mich. 504; *Fellows v. Prentiss*, 3 Denio (N. Y.) 512 [45 Am. Dec. 484]; *McInerney v. Lind-*

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say, 97 Mich. 238 [56 N. W. Rep. 603]; *Wright v. Bartlett*, 43 N. H. 548; *Gordon v. Bank*, 144 U. S. 97 [12 Sup. Ct. Rep. 657; 36 L. Ed. 360]; *Hubbard v. Gurney*, 64 N. Y. 457; *Hill v. Bostick*, 18 Tenn. (10 Yerger) 410; *Taylor v. Allen*, 36 Barb. (N. Y.) 294; *Shaw v. Nolan*, 8 La. Ann. 25; *Michigan State Bank v. Leavenworth*, 28 Vt. 209; *Johnston Harvester Co. v. McLean*, 57 Wis. 258 [15 N. W. Rep. 177; 46 Am. Rep. 39]; *Howard v. Iron Co.* 64 Me. 93; *Gates v. Bank*, 59 Tenn. (12 Heisk) 325; *McComb v. Kittridge*, 14 Ohio 348; Benjamin's Chalmers, Notes & Checks 250; *Newton v. Baker*, 125 Mass. 30; 2 Daniel, Neg. Instr. Sec. 1323; *Veazie v. Carr*, 85 Mass. (3 Allen) 14; *Dorlon v. Christie*, 39 Barb. (N. Y.) 610; *Wood v. Bank*, 9 Cowan (N. Y.) 194; *Hubbly v. Brown*, 16 Johns. 70; *Union Bank v. McClung*, 28 Tenn. (9 Humph.) 98; *Morse v. Huntington*, 40 Vt. 488; *Hagey v. Hill*, 75 Pa. St. 108 [15 Am. Rep. 583]; *Peoples' Bank v. Persons*, 30 Vt. 701; *Bank v. Walter*, 104 Tenn. 11 [55 S. W. Rep. 30]; *Billington v. Wagoner*, 33 N. Y. 31; *Kittle v. Wilson*, 7 Neb. 76; *Hosea v. Rowley*, 57 Mo. 357; *Starret v. Burkhalter*, 70 Ind. 285.

WANAMAKER, J.

The plaintiff, for its cause of action says that it is a corporation duly organized under the laws of the state of Ohio, carrying on a general banking business at Akron, Ohio.

That its cause of action is founded upon a promissory note of which the following is a copy, with all credits and the indorsements thereon:

\$2,500.

Barberton, O., May 16, 1904.

Two months after date we promise to pay to the order of ourselves, twenty-five hundred dollars, with interest at — per cent per annum at American Nat. Bank. Value received.

No. 728 due July 15.

THE BARBERTON POTTERY Co.,

Per Geo. C. Pryor, Sec.

Said note is indorsed as follows: The Barberton Pottery Co., Geo. C. Pryor, Sec., Geo. G. Pryor, Chas. M. Karch, C. H. Schubert, J. E. Whigam, John McNamara, A. W. Blackburn, A. F. Stuhldreher, B. F. Tracy, Geo. Cox.

There are no credits or indorsements on said note other than as above set forth, except that the interest has been paid up to May 16, 1906.

Plaintiff says that it is the holder and owner of said promissory note and that the same was delivered to it for value at the time of its execution, and that prior to said delivery to it the defendants, Geo. C. Pryor, Chas. M. Karch, C. H. Schubert, J. E. Whigam, John McNamara, A. W. Blackburn, A. F. Stuhldreher, B. F. Tracy and Geo. Cox signed said note on the back thereof.

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Plaintiff further says that the Barberton Pottery Company has been since the execution of said note duly adjudged a bankrupt. That there is due to the plaintiff from the defendants, the Barberton Pottery Company, Geo. C. Pryor, Charles M. Karch, C. H. Schubert, J. E. Whigam, John McNamara, A. W. Blackburn, A. F. Stuhldreher, B. F. Tracy and George Cox, as makers of said note, the sum of \$2,500 with interest thereon from May 16, 1905, which it claims and for which it asks judgment.

The defendants, the Barberton Pottery Company, A. W. Blackburn and George C. Pryor are in default for answer or demurrer; and the remaining defendants, Charles M. Karch, C. E. Schubert, J. E. Whigam, John McNamara, A. F. Stuhldreher, B. F. Tracy and George Cox, for their answer to plaintiff's petition, say that they admit that the plaintiff is a banking corporation doing business as such at Akron, Ohio, as alleged in the petition.

They admit that the note set out in plaintiff's petition is a correct copy thereof with the indorsements thereon as in said petition alleged, and that the Barberton Pottery Company was duly adjudged a bankrupt on or about July 15, 1905.

These answering defendants further say by way of their first defense, that they, at the request of said Barberton Pottery Company, and without any consideration moving to them, or any of them, and solely for the accommodation of said company, signed their names upon the back of said note, and thereafter the same was delivered to said plaintiff, all of which facts hereinbefore alleged were well known to the said plaintiff.

These answering defendants further say that when the said note became due and payable the same was not presented for payment at the American National Bank as provided in said note, and the said maker, the said Barberton Pottery Company, failed and neglected to pay the same, and made default in payment thereof, and the said plaintiff unlawfully, carelessly and negligently failed to notify these answering defendants, or any of them, of such default in the payment of said note.

By way of a second defense they plead a certain renewal note given in lieu of the original note, by reason of which the time of payment of the original note was extended and that in taking and receiving said new note in lieu of said original note set out in the petition, no reservation was made, either expressly or otherwise, of any right of recourse against these answering defendants, or any of them, and that said renewal note was given and taken without the knowledge or consent of these answering defendants, or any of them, by reason of which they should be discharged from any liability to the plaintiff.

By way of a third defense, these answering defendants say that a

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third note was given in lieu of the former notes heretofore given, whereby the time of payment was extended, and the interest thereon paid by discounting said third note; that by such extension of time and by giving said third note in lieu of said other two notes, without the knowledge or consent of these answering defendants, or without any reservation whatsoever, either express or otherwise, of any right of recourse against them, they are discharged in law from any further liability to the plaintiff bank.

By way of a fourth defense these answering defendants say that after said third note had become due, and for a good and valuable consideration, the plaintiff bank agreed with said Pottery Company to extend the time of payment of said third note until four months after May 16, 1905. That on said May 16, 1905, the Pottery Company paid the bank the interest to date upon said third note, and received the fourth note in lieu of all the other notes, but not making in said fourth note, nor in any manner whatsoever, any reservation, either express or otherwise, of any right of recourse against these answering defendants, or any of them.

These answering defendants, therefore, say, that by extending the time of payment of said indebtedness and by receiving said last note in lieu of all the others, and without making any reservation as aforesaid, all without their knowledge and consent, that they have been discharged from any further liability to the plaintiff upon any of said notes.

They further say that no notice of dishonor was ever served on them as to a default in any of said notes; wherefore, they pray for judgment.

To these sundry defenses the plaintiff bank has demurred, and that raises the following legal questions:

First. What is the relation of the parties defendant to the note described in plaintiff's petition?

Second. What are their resulting liabilities and rights?

It is conceded by the parties to this controversy that the relation of the defendants to the note in question must be determined and fixed by the new negotiable instruments code (95 O. L. 162; Rev. Stat. 3171 *et seq.*; Lan. 4898 *et seq.*), which was adopted in Ohio on April 17, 1902, and went into effect January 1, 1903; and that if said code fails to determine the relation of the parties, then it is fixed by the law merchant as construed and applied by our courts prior to the adoption of this code.

Prior to the adoption of the code a great diversity of adjudications appeared in the different states as to the exact relation that an indorser in blank before delivery sustained to a promissory note. In some states such an indorser was held to be a joint maker; in others a surety; in others, a guarantor; in others, merely an indorser.

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In one of the latest cases before the Supreme Court of Ohio, the court recognizes this great variance as to the liability of an indorser as held by the supreme courts of various states in the following language of the court, as it appears on page 606 of *Ewan v. Brooks-Waterfield Co.* 55 Ohio St. 596 [45 N. E. Rep. 1094; 35 L. R. A. 786; 60 Am. St. Rep. 719]:

"Precisely what is the nature of the legal obligation contracted by a stranger who indorses his name in blank on the back of a negotiable promissory note before or at the time it takes effect, is a question upon which the courts have widely differed; some holding that his obligation is that of a second indorser; others have held him liable as guarantor; and still others as a maker with the rights of a surety."

This diversity of adjudication led to a movement for a new negotiable instruments code, which should bring about greater uniformity among the states as to the liability of the parties to a negotiable instrument. In addition to Ohio, the following states and territories have, within the last ten years, adopted such code: Ariz., Cal., Conn., District of Columbia, Fla., Ia., Md., Mass., N. J., N. Y., N. C., N. D., Ore., Pa., R. I., Tenn., Utah, Vir., Wash., Wis., and some others.

The preamble of that code as adopted in Ohio reads as follows: "To establish a law uniform with the laws of other states on negotiable instruments."

What are the provisions of this code as to the relation of the parties defendant to the note in question? Revised Statute 3178a (Lan. 5088), provides:

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

And this section is under the head of "General provisions," showing that it must be read into all the other sections of the code.

Under the head, "Liabilities of parties," we have the following:

Revised Statute 3173h (Lan. 4960). "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Revised Statute 3173i (Lan. 4961). "Liability of irregular indorser.

"Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or

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drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Revised Statute 3173k (Lan. 4963). "Liability of general indorser.

"Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

"1. The matters and things mentioned in paragraphs numbered one, two and three of the next preceding section;" which relates to genuineness of instrument, good title, and capacity of prior parties to contract.

"2. That the instrument is at the time of his indorsement valid and subsisting.

"And, in addition, he engages that on due presentment, it shall be accepted or paid or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

Revised Statute 3173l (Lan. 4964). "Liability of indorser where paper negotiable by delivery.

"Where a person places his indorsement on an instrument negotiable by delivery, he incurs all the liabilities of an indorser."

There are all of the provisions of the code that directly bear upon the relation that one sustains to a promissory note who appears as a stranger to the instrument, signing his name upon the back thereof at the time of execution or before delivery.

In the same code, however, Rev. Stat. 3171p (Lan. 4914), appears a general rule of construction in case of ambiguity, as follows: "Construction where instrument is ambiguous.

"Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply: * * *

"6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

From these provisions of the code what is the relation of these answering defendants to this promissory note?

There is only one reported case in Ohio that throws any light upon this question, to wit, the case of *Rockfield v. Bank*, 28 O. C. C. 720. The syllabus of that case is as follows:

"One who places his name on the back of a promissory note before delivery is a maker or surety, and is not entitled to notice of presentment and nonpayment. The act of April 17, 1902 (95 O. L. 162), known as 'The negotiable instrument act,' does not change the liability

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of such party as established by the Supreme Court of the state for many years."

In that case the circuit court of Clark county affirmed the judgment of the court of common pleas, and the plaintiff in error has prosecuted his cause to the Supreme Court of Ohio, where it is now pending.

This court has read and reread and very carefully considered the oral opinion of Judge Dustin in *Rockfield v. Bank*, *supra*, and with much reluctance is frank to state that it does not agree with the learned judge either in his reasoning or his conclusion as to the relation which one sustains to a promissory note, who has written his name on the back thereof before delivery.

There can be no doubt but what the law of Ohio prior to the negotiable instrument code clearly made such a person a joint maker or surety, *Ewan v. Brooks-Waterfield Co.* *supra*. But the obvious and manifest purpose of our code was to correct the diversity of holdings in this respect among the different states, and it is, therefore, to the code that we must look to determine the relation the defendants sustain to the note. To this court it seems very clear that under the first section above cited (Rev. Stat. 3178a; Lan. 5088) the defendants are not "primarily" liable on the instrument. They are not absolutely required to pay the same by the terms of the instrument.

No rule is better established among courts than that,

"If the language of the statute is plain and free from ambiguity, and expresses a single definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. In other words, the statute must be interpreted literally." Black, Interpretation of Laws 35-36, and cases cited.

But it may be claimed that the heading of Rev. Stat. 3173i (Lan. 4961), to wit:

"Liability of irregular indorser" should be read into that section, making it distinctive, exceptional and separate from the other sections of the code that refer to indorser generally, using the terms "each," "any" or "every indorser."

"Headings prefixed to the titles, chapters and sections of a statute or code may be consulted in aid of the interpretation, in case of doubt or ambiguity; but inferences drawn from such headings are entitled to very little weight, and they can never control the plain terms of the enacting clauses." Black, Interpretation of Laws 181, and case cited.

What is meant by the terms of the instrument? Is it anything more than the language that appears upon its face? Is it any more than the express terms of the instrument? For if implied terms are to be read into the instrument, the courts of one state having held that the implied terms create one order of liability, such as maker; the courts of another

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state having held that the implied terms create another order of liability, such as survey; the courts of another state having held that the implied terms create another order of liability, such as guarantor or indorser merely, we would have the same want of uniformity under the name of judicial interpretation or construction that prevailed in former judicial construction of the law merchant or legislative enactments.

It is untenable and unreasonable to claim that a mere indorsement in blank shall add to or diminish the liability created by the terms on the face of the instrument; for if the implied terms shall control, upon which the courts of different states have placed such radically different constructions, then the new code is not only a failure but a farce, and the same variations must continue to prevail, because it is dependent in the last analysis upon the judicial construction given to the implied terms of the instrument by virtue of so-called blank indorsements. If, however, there were any question about the secondary liability of the defendants on this instrument, it seems to the court that such doubt is removed by Rev. Stat. 3173g, 3173h, 3173i, 3173k (Lan. 4959, 4960, 4961, 4963), all of which treat a person who places his signature upon the back of a note before delivery (in the same manner in which these defendants did) as an indorser; and Rev. Stat. 3173h (Lan. 4960), which is as general and as comprehensive as language can make it, reads:

“A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.”

What are the appropriate words on this to show any other liability? There are *no* words here to indicate anything except a blank indorsement—nothing but a name.

The section following, Rev. Stat. 3173i (Lan. 4961), again fixes the liability of such a person as an indorser, but undertakes to go no further than to determine the nature of his liability. What his rights are, what the duties of the other parties to the instrument may be with reference to him are in no wise considered in this last section, though Judge Dustin, in the case of *Rockfield v. Bank*, *supra*, seems to read into the section the rights and duties of such indorser when the statute undertakes to do nothing more than fix the liability, and fixes it as indorser. The same party, cannot, in the same instrument, have the liability of both indorser and maker or surety. He is one or the other as to the payee of the note, the plaintiff. The code has even gone further, and provides, Rev. Stat. 3171p (Lan. 4914):

Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.”

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The circuit court above referred to evidently felt an invasion of this character upon the commercial law of Ohio must greatly disturb business affairs, and, through oversight or inadvertance, might cause very serious loss, and by reason thereof endeavored to sustain the old law regardless of whether the new code was declaratory and confirmatory of it or otherwise.

As this court views these statutes upon the question of the liability of these defendants, they are so plain, so clear, so obvious in their terms, that there is no room for judicial construction; and even if a court fully believed that the legislature did not intend to change the former law merchant in this respect, the court would not be warranted in making such a holding.

The Supreme Court has expressly passed on just such a case. In *Woodbury v. Berry*, 18 Ohio St. 456, the syllabus reads as follows:

"Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising outside of the language of the statute, it may be convinced that the legislature intended to enact something different from what it did in fact enact."

The new code fixing the relation of these parties to the instrument as that of indorsers, no matter whether general indorsers or irregular indorsers, can it be said that the parties are makers or sureties? The law is presumed to be equitable, and if the burden is that of indorser, it cannot be justly contended that their corresponding rights are any less than those of an indorser, but the code likewise provides for these. Revised Statute 3173o (Lan. 4967) reads:

"Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment on his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

The answer in this case contains the express averment that there was no presentment made for payment of the note in question, either to the parties primarily or those secondarily liable.

Revised Statute 3173k (Lan. 4963). "Liability of general indorser.

"Every indorser who indorses without qualification, warrants, to all subsequent holders in due course: * * *

"And, in addition, he engages that on due presentment, it shall be accepted or paid or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

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Revised Statute 3174g (Lan. 4986). "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

Clearly here the language "each indorser" and "any indorser" is as generic as language is capable of; it is comprehensive and includes any kind of an indorser.

Revised Statute 3175f (Lan. 5012). (When notice need not be given to indorser). "Notice of dishonor is not required to be given to an indorser in either of the following cases:

"1. Where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument.

"2. Where the indorser is the person to whom the instrument is presented for payment;

"3. Where the instrument was made or accepted for his accommodation."

Clearly the answering defendants are not within any one of these three exceptions.

To come to any other conclusion than that the relation of the answering defendants to this note is other than that of an indorser, and that their rights are those of an indorser, would require the employment of nothing short of legal legerdemain, and do violence, under the guise of interpretation, to the plainest, clearest words of commercial English.

This view of the relation of the defendants to the instrument in question, to wit, that of indorser, is announced and approved in the late work of Eaton & Gilbert, Commercial Paper. Attention is especially challenged to page 433 of that work, where the following language is employed: "An indorsement for accommodation, like every other indorsement, is an original contract binding the indorser in favor of the holder. The relative rights and duties of such indorsers are the same as in the case of any other instrument; and they are subject to the same obligations."

Page 442 of the same work:

"It is a well-established rule that an indorser cannot be charged for the nonpayment of a negotiable instrument unless presentment for payment be made to the maker of the note or the acceptor of the bill. * * * Since an irregular indorser who places his signature on the instrument in blank before delivery is an indorser, a demand of payment must be made upon the maker to bind him as such indorser. A person indorsing an instrument for the accommodation of the maker of a note cannot be charged without a demand. And this is true although

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the indorsement was made with full knowledge of the insolvency of the maker, and for the sole purpose of giving the note credit and currency."

After a most diligent search among the most recent decisions from the negotiable instruments code states, the court has found no case in which it has been held that an accommodation indorser is not entitled to have payment first demanded of the maker, and on default to have notice of dishonor. Indeed, it seems that these states have assumed that the plain provisions of the statute made this imperative in order to charge such indorsers.

In *Rouse v. Wooten*, 140 N. C. 557 [53 S. E. Rep. 430], the question was raised as to whether or not under the code a surety was not even entitled to notice of nonpayment and dishonor, the court there holding that he was not so entitled for his liability, by the terms of the instrument, was primary. This case, in discussing primary and secondary liability, places the surety with the maker; but as to the others, such as guarantors and indorsers, treats them as having only secondary liability. The matter is not, however, logically discussed. It is assumed as one of the plain provisions of the code.

In *Burgettstown Nat. Bank v. Nill*, 213 Pa. St. 456 [63 Atl. Rep. 186], the same doctrine is held as to an accommodation indorser. The question, however, in that case was as to whether or not there was a waiver of protest, it being assumed that the defendant indorser was entitled to protest. The court held that under the facts of that case he had waived his right to notice of dishonor.

In *Toole v. Crafts*, 78 N. E. Rep. 775 (Mass.), Judge Hammond, in the opinion, uses this language:

"This is a suit upon a promissory note dated June 2, 1900, signed by the defendant, Howard A. Crafts, and payable to the order of the plaintiff on demand. Before its delivery to the plaintiff the other defendant, Linus D. Crafts, who alone defends, placed his name upon the back of it. He is therefore liable only as an indorser. St. 1898, p. 502, c. 533, Sec. 63, now Rev. Laws c. 73, Sec. 80. No demand sufficient to charge him as indorser ever was made upon the maker, and, if the matter had stood there, his defense would have been perfect."

This same doctrine is announced by Judge Hammond in a case decided a few months prior to this. *Quimby v. Varnum*, 190 Mass. 211 [76 N. E. Rep. 671].

The primary purpose of the adoption of the negotiable instrument code was to obtain uniformity of decision where before there was great diversity. The state legislatures having enacted the code in the identical language of each other, it would be unfortunate, indeed, fatal, to such uniformity if courts, under the pretext of judicial interpretation or

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construction, were so to vary and violate the plain provisions of the code as to undo and overthrow the very purpose of the code.

The supreme courts of Pennsylvania, Massachusetts, as well as other states where the code is in force, having held that an accommodation indorser was entitled to the right of notice of dishonor upon failure of payment by the makers of the note, this court, notwithstanding the holding of the circuit court of Clark county to the contrary, holds that in this case the defendants were entitled to have demand of payment made upon the makers, and in case of default to notice of dishonor.

It being further pleaded in the second, third and fourth defenses that there was an agreement binding upon the holder to extend the time of payment and to postpone the holder's right to enforce the instrument without the right of recourse against the defendants being expressly reserved, the court finds that as to those defenses the demurrer should be overruled.

The demurrer, therefore, to the several defenses of the defendants is overruled and exception noted.

Myers v. Myers.

ATTORNEY FEES—PARTITION.

[Crawford Common Pleas, April 13, 1907.]

FRANK R. MYERS ET AL. V. MARGARET MYERS ET AL.

ATTORNEY'S FEES NOT ALLOWED IN PARTITION, WHEN.

When an action had been commenced in partition, but afterwards the administrator of the common ancestor filed a cross petition asking the sale of the real estate described to pay the ancestor's debts, and the property was sold on such cross petition, no attorney fee can be allowed counsel for the plaintiffs under Rev. Stat. 5778 (Lan. 9315).

[For other cases in point, see "Attorney and Client," §§ 408-410; "Partition," §§ 258-262.—Ed.]

[Syllabus by the court.]

L. C. Feighner and Anson Wickham, for plaintiffs.

Scroggs & Monnett, for administrator of J. G. Myers.

Finley & Gallinger, Kennedy & Kennedy, and W. J. Schwenck, for other heirs.

BABST, J.

The question submitted in this proceeding is: Can the court lawfully make an allowance of compensation to plaintiffs' attorneys for services? The record discloses that in June, 1906, Frank R. Myers and another filed a petition in partition in this court, praying for partition in certain premises therein described, and in the alternative, that if partition cannot be made, a sale of the premises may be made. All parties in interest were made parties. July 28, 1906, Margaret Myers and Isaiah Myers filed answers and cross petitions averring their respective rights in the premises. Both of these cross petitions contain allegations antagonistic to the petition, but as they have been passed upon, it is not necessary to review them in order to consider the question now before the court. Later, like cross petitions were filed by other heirs. August 21, an amendment to the petition was filed correcting the names of certain heirs as named in the petition.

June 30, Geo. J. Stuckert as administrator of the estate of John G. Myers, the common ancestor, filed an answer in which he averred his fiduciary capacity, gave the date of J. G. Myers' death November 16, 1905, less than one year before the filing of the petition, denied the sufficiency of the personal estate of J. G. Myers to pay his debts, and affirmed that it would be necessary to sell the real estate to pay the debts, and pleaded the pendency in probate court of a proceeding to sell the same premises to pay debts.

December 10, the administrator filed an amended answer and cross petition, followed, December 19, by a second amended answer and cross petition,—the latter two differing only as to the definiteness of certain averments—which in a large sense, were intended to raise and did raise

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purely legal questions as to the right of partition within a year after the death of the common ancestor, and as to the effect of an order of sale issued by the probate court during the pendency of partition proceedings. They also, by cross petition, made the necessary allegations for a sale of the premises by himself as administrator to pay the debts of John G. Myers.

On demurrer to this second amended answer and cross petition, the case went to the circuit court and that court denied partition, found for the administrator on his cross petition, and directed a sale by him, which was duly made, the sale confirmed and the purchase price is now in the hands of the administrator. The decision of the circuit court will be found at *Myers v. Myers*, 29 O. C. C. 396.

This is a brief review of the facts as disclosed by the pleadings and record. Counsel for plaintiffs, Frank R. Myers *et al.*, now move that the court make an allowance of a reasonable attorney fee as part of the costs, under Rev. Stat. 5778 (Lan. 9315). The administrator moves that the court strike this motion from the files on the ground that this is not a partition proceeding and that the court has no jurisdiction to allow an attorney fee. To determine this question, the court must find and declare the character of this proceeding.

Is it a case in partition? If it is, the motion to strike from the files must be overruled.

Is it a proceeding to sell the real estate of a deceased person to pay his debts? If so, the motion to strike from the files must be sustained.

This court has jurisdiction in partition and the probate court has not. Both courts have concurrent jurisdiction to sell real estate to pay debts of a deceased person. A case in partition can eventuate in only one of two ways: First, by an apportioning so that each of the tenants in common or coparceners may have set off his share; or, second, failing this, on finding by the commissioners that partition cannot be made, a sale of the premises and distribution of the proceeds of sale less costs, according to the respective interests of the parties. This, in strictness, means a proceeding in this court that cannot be had in the probate court. In partition, deeds are made by the sheriff and if sold, the proceeds are ordered paid out by this court.

Under a sale by the administrator, he receives the whole proceeds and out of it, pays the costs, and then makes final settlement, not in this court but in the probate court. The character of these proceedings is so radically different that they cannot be confused.

In this case, partition was denied, a finding was made by the circuit court for the administrator and a sale accordingly. So we find and hold, that the proceeding, although commenced in partition,

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terminated in a proceeding to sell real estate by the administrator for the payment of the debts of the decedent.

Can this court, having thus found the nature of the action, now allow an attorney fee? The case of *Young v. Stone*, 55 Ohio St. 125 [45 N. E. Rep. 57], is not in point. That was clearly a case in partition and where the attorney agreed to perform the services for a sum certain; and it was held he waived the compensation otherwise provided. Neither is there any question that the case of *Leyman v. Leyman*, 10 Circ. Dec. 806 (19 R. 654), was a case in partition.

In the cases of *Thomas v. Moore*, 52 Ohio St. 200 [39 N. E. Rep. 803], and *Sherman v. Millard*, 27 O. C. C. 175, it is held that the question of attorney fees in administration cases is a matter of personal contract between the administrator and his counsel, and that these contracts do not bind the estate. If the amount paid was reasonable and the services for the benefit of the estate, the administrator will be allowed credit for the same on his expense account, but any party interested may contest the "allowance of any credit claimed for counsel fees paid, on the ground that the services were unnecessary, or became necessary from the wrongful act or neglect of the representative, or, that the amount paid was unreasonable. 'The rule is, that the administrator can be allowed credit only for counsel fees which he has actually paid, and no more than is a reasonable compensation for the services rendered to the estate, no matter what the administrator has actually paid or contracted to pay; and the burden is on him to prove the necessity and value of the services.' Woerner, Administration Sec. 515." *Thomas v. Moore*, *supra*, page 206.

So, having found this to be a proceeding by an administrator to sell real estate to pay debts of a decedent, and finding the law to be, that the service of counsel in such a case is a matter of private contract between such counsel and the administrator, the court holds that it has no authority to make an allowance to counsel for the plaintiffs and sustains the motion of the administrator to strike their motion for such allowance from the files.

Superior Court of Cincinnati.

CORPORATIONS—RIGHTS OF STOCKHOLDER—RECEIVERS.

[Superior Court of Cincinnati, Special Term, December, 1906.]

JOSEPH W. HEINTZMAN V. TENACITY LOOSE LEAF METAL CO. ET AL.

1. RIGHTS OF STOCKHOLDER TO RECEIVER FOR WASTE OF CORPORATE PROPERTY.

A defendant corporation will not be heard to complain of failure on the part of a stockholder, asking for a receiver and accounting, to exhaust his rights within the corporation, where the stockholder charges waste of corporate property and fraud in its sale, and proffers evidence in support of his charges; nor is it necessary under such circumstances that the corporation itself bring the suit.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 841-874.—Ed.]

2. WHEN A STOCKHOLDER MUST COMPLAIN OF ACT OF OFFICERS.

It cannot be said that such a stockholder making such allegations does not come into court with clean hands, because after a partial discovery of the fraud, and while declaring the transactions illegal, he offered to sell his stock to anyone who would take it, nor can he be said to have acquiesced in things of which he had no knowledge or only partial knowledge.

3. APPOINTMENT OF RECEIVER FOR MISMANAGEMENT.

A court will not hesitate to displace a board of directors by appointing a receiver, where it appears that the purpose of the plaintiff is not to regulate the internal affairs of the corporation, but that his action is due to an abuse of power by the officers of a majority of the stockholders by misappropriating the corporate property or using it for their individual profit. Under such circumstances it would be a vain thing to leave the property in the hands of the board *pendente lite*.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 2011-2018;

7 Cyc. Dig., "Receivers," §§ 38-86.—Ed.]

[Syllabus approved by the court.]

APPLICATION for receiver.

J. W. Heintzman and R. A. Black, for plaintiff,
Bates & Meyer, for defendants.

HOFFHEIMER, J.

Plaintiff claiming to be the owner of two shares of stock in the Tenacity Loose Leaf Metal Company brings this action and asks for a receiver, injunction and an accounting. The gravamen of the complaint is breach of fiduciary duty on the part of majority directors and stockholders for personal gain. Waste and loss of corporate property are alleged.

For the purpose of determining whether a receiver should be appointed I deem it unnecessary to consider any acts of mismanagement other than those which relate to the September meeting of the directors, when a certain contract is alleged to have been entered into between the Tenacity Company and W. J. Schultz and the W. J. Schultz Tenacity Company, whereby in exchange for stock in said new corporation it was agreed on behalf of the Tenacity Company to surrender its stock and

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likewise turn over to said The W. J. Schultz Tenacity Company all its assets and dissolve the Tenacity Company. It is claimed that defendant, Schultz, who operated his own business and was president and treasurer of the Tenacity Company and largest stockholder therein, controlled the majority and undertook a merger of his own business and the corporation for his own profit and the profit of codirectors and at the expense of the corporation of which they were trustees. That in thus agreeing to sell out and attempting to dispose of the company's assets they were guilty of fraud and bad faith and were wasting the property of the corporation. Incidental to the main contention and as auxiliary thereto a receiver is asked to take charge of the corporate property and to preserve and manage it for the corporation.

The defendants by answer in substance deny that plaintiff is the owner of the stock sued on. They deny fraud or bad faith. They say the sale to the W. J. Schultz Tenacity Company was for full value, upon full disclosure. They deny the assets of the Schultz business were of less value than the purchase price, and they say that the sale was for the mutual benefit of all concerned.

Defendants by way of argument further complain that no demand was made by plaintiff or the corporation or the directors to correct any alleged irregularities within the corporation as was his right and his duty, and further that plaintiff did not exhaust his rights within the corporation itself before bringing this action.

As there is no question in my mind but that plaintiff is the owner of the stock sued on, under the facts in this case as they have developed at the hearing in the last few days, this was not necessary, nor was it necessary under the circumstances that the corporation itself bring this suit.

It is perfectly clear to my mind that the contract of the September board meeting whereby the directors undertook to dispose of all the assets of the Tenacity Loose Leaf Metal Company was not made in good faith and for the best interests of the corporation, and if permitted to stand would result in waste and loss of the corporate property. It seems that since this alleged sale was made one or two of the stockholders who voted for the sale are now co-operating with this plaintiff, although it was assumed at the hearing that inasmuch as they acquiesced in what was done they have no right to the relief here claimed. Inasmuch as they demanded to see an inventory of W. J. Schultz's business and were declared out of order, it is evident no proper disclosure was made to them, and I very much doubt whether they were bound by their assent. *Ives v. Smith*, 3 N. Y. Supp. 645. It is not necessary, however, to pursue that question any further, because if this plaintiff

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is properly in court, the relief to be granted redounds not to his benefit but to that of the corporation.

The question then is: Is plaintiff a proper party? Although he took no part in the sale complained of, nevertheless defendants say that he is barred by laches and by acquiescence. Is this true? It may be, that plaintiff had some knowledge that radical steps were being taken by the directors; the extent of that knowledge however is shown in the misinformation as it appears in the petition filed herein, all of which necessitated the filing of an amended petition to conform to the real facts. It is further true that plaintiff may have waited some six weeks before seeking the intervention of equity, and it is true that on October 10, 1906, he was requested by the defendant, the W. J. Schultz Tenacity Company, to turn in his certificates for stock in the W. J. Schultz Tenacity Company. He replied November 3, 1906, that he believed the attempted merger illegal and stated that he was disposed to ask a receiver. In that letter he offered his stock for sale to any person, and asked to hear from the company.

Notwithstanding his statement that he believed the merger was illegal, I see no reason why he was to be deprived of his right to sell his stock if he could. His motives would be entirely immaterial, for it might well be that a minority stockholder would be willing to step out rather than fight what he supposed was an illegal act merely.

At the hearing, however, he ascertains for the first time the true inwardness of the September meeting, and he learns of the conditions, financial and otherwise, of all the parties. It was then that the acts of bad faith with which the majority stockholders stand charged developed, and it was then that he obtained information as to mismanagement. This appearing, I do not think the incident of the letter or his offer to sell rendered his hands unclean, nor can he be said to have acquiesced, for obviously one cannot acquiesce in things not known.

It was not incumbent on plaintiff as a stockholder to know the acts of the directors or the details of their management. *Agricultural Cattle Ins. Co. In re*, L. R. 1 Ch. App. 161. Nor was he bound to keep himself posted or informed as to the various acts of the corporation; and he was not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books. *Ib.*; 2 Cook, Corporations Par. 731. And to be guilty of laches the well-established rule requires that knowledge must coexist or concur with delay. *Evans v. Smallcombe*, L. R. 3 H. L. 249, affirming L. R. 3 Eq. 769; 2 Cook, Corporations Par. 731. Moreover, the trustee of an express trust, such as a director is, cannot set up laches as against his *cestui que trust*. I Pomeroy, Eq. Jurisp. Sec. 418, and cases cited.

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As the plaintiff had no knowledge of the bad faith charged and could not have acquiesced, and as he has been duly diligent, it remains to determine whether the extraordinary remedy of receivership is justified by the facts. Because this remedy is considered drastic, considerable latitude was allowed counsel at the hearing. Not only was the alleged fraudulent sale gone into fully, but transactions with reference to the general management of the Tenacity Company were inquired into. That there was wilful mismanagement there can be no doubt. The improper declaration of a 10 per cent dividend to "make a showing," and the application of his share thereof by defendant, Schultz, towards paying off unauthorized overdrafts made by him on the company, and the unauthorized use of money by the Loxit Company, are illustrations. It is enough for the purposes of this hearing to say that it is clear that defendant, Schultz, and other corporate officers dealt with this corporation at the expense of their trust—and I refer particularly to the pretended sale of September—a sale which has all the earmarks of bad faith and which was for their individual profit. Such a sale cannot be permitted to stand. Under such circumstances equity will intervene. *Haywood v. Lumber Co.* 64 Wis. 639 [26 N. W. Rep. 184]; *Lewis, In re*, 52 Kan. 660 [35 Pac. Rep. 287].

Where it appears, as in this case, that the stockholder is not requesting a receiver simply to regulate the internal affairs of a corporation, but because of the attempt on the part of the officers or the majority stockholders to abuse their power by misappropriating the corporate property, by using the corporate property for their individual profit, or by so acting as to wilfully and wrongfully jeopardize the corporate business, then equity should not hesitate to afford relief. No one is more helpless unless aided by the arm of the law than the holder of a small portion of the stock of a corporation when the large stockholders combine to advance their private interests at the expense of the corporation. *Irvine, C., in Ponca Mill Co. v. Mikesell*, 55 Neb. 98 [75 N. W. Rep. 46]; 5 Pomeroy, Eq. Jurisp. Par. 122 (ed. 1905).

This principle is applicable to the facts before me. Defendant, Schultz, in combination with others under his control brought about the sale. The other stockholders (save and except plaintiff), the only stockholders who actually paid money into the corporation, although they may have voted for the sale, did so without full disclosure. Still, as the acts complained of were permitted by the board of directors, the court would be doing a vain thing to place the property in the hands of the board *pendente lite*. Displacing the board by the appointment of a receiver is not an ordinary remedy, yet such should be done when necessary to protect the corporate property. 5 Pomeroy, Eq. Jurisp. Par. 122 (ed. 1905).

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Guided by these authorities and exercising the inherent powers of the court, in view of the disclosures I have determined to appoint a receiver as prayed for to protect, manage and preserve the property of the Tenacity Loose Leaf Metal Company now being held by these defendants or any of them. And the defendants and each of them are hereby ordered and directed to surrender and turn over to and place in the custody of said receiver whatever assets or property they or any of them may have in their possession under the pretended contract of September, or otherwise, belonging to said The Tenacity Loose Leaf Metal Company, including its minutes, books, papers, effects, furniture, patents and its property of whatever kind or description. The receiver will be directed to hold same and otherwise carry out all the decrees, orders and mandates of this court as may be issued herein until such time as the court may deem it proper and to the best interests of all concerned to restore the property to the duly constituted officers of the company.

With reference to the claim made that private profits have been made at the expense of the corporation by the officers, or some of them, necessitating an accounting, I will direct the receiver to employ some person expert in the matter of bookkeeping to examine the books and make a report on this question.

Receiver to be appointed.

INTOXICATING LIQUORS—EVIDENCE.

[Franklin Common Pleas, November, 1906.]

NELLIE LEONARD V. WILLIS G. BOWLAND, TREAS.

1. WHAT CONSTITUTES TRAFFICKING IN INTOXICATING LIQUORS.

Trafficking in intoxicating liquors, within Rev. Stat. 4364-9 (Lan. 7248), does not necessarily mean that one must have and maintain a bar and bar fixtures, nor to have a stock of liquors on hand; and where one has an arrangement with a nearby saloon where beer is secured, as called for, and resold at a large profit the same falls within the statutes governing the sale of intoxicating liquors, and a levy on goods and chattels in satisfaction of the tax assessed against such business will be sustained.

[For other cases in point, see 5 Cyc. Dig., "Intoxicating Liquors," §§ 1-7.—Ed.]

2. PRESUMPTION OF VALIDITY OF TAX FROM ENTRY ON AUDITOR'S DUPLICATE.

Where a liquor tax has been assessed and entered by the county auditor, the duplicate becomes, by operation of Rev. Stat. 1104 (Lan. 2451), *prima facie* evidence as to the amount and validity of such tax, and the burden is cast upon the one assessed to prove that he was not engaged in the liquor business at the time covered by the assessment.

[For other cases in point, see 5 Cyc. Dig., "Intoxicating Liquors," §§ 111-118.—Ed.]

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3. SUFFICIENCY OF EVIDENCE TO PROVE ONE IS TRAFFICKING IN INTOXICATING LIQUOR.

Evidence that one had openly engaged in the business of trafficking in intoxicating liquors until the \$.1000 tax became operative, when she discontinued said business, coupled with proof that shortly thereafter she had sold beer, procured at a nearby saloon under apparent arrangements, at a great profit, is sufficient proof of trafficking in intoxicating liquors.

4. EFFECT OF FAILURE TO DEMAND PAYMENT OF TAX.

The fact that no demand was made, at the seller's place of business, for the payment of a liquor tax is immaterial after the parties and goods levied on are before the court for the determination of the issues involved.

[Syllabus approved by the court.]

EVANS, J.

The plaintiff seeks to enjoin the county treasurer from advertising and selling her household goods, levied upon under distraint by said treasurer for nonpayment of liquor tax and penalties claimed by defendant to be due from plaintiff.

By cross petition the defendant prays for an order for leave to sell said chattel property for payment of said liquor tax, penalties and costs, and for the vacation of the restraining order.

The principal question here for determination is, whether the plaintiff was engaged in the traffic in intoxicating liquors on and subsequent to May 28, 1906, in this city. She claims that she was not so engaged at said time, and, if her contention is true, then she would be entitled to a permanent injunction. On the other hand, if she was engaged in said traffic at said time then her said goods and chattels so levied on would be subject to sale in satisfaction of said tax, penalties and costs. On June 13, 1906, the defendant, as county treasurer, entered upon the tax duplicate against plaintiff the amounts of taxes and assessments and of the nonpayment thereof for the liquor tax under the act of March 28, 1906, and that plaintiff was engaged in said traffic at 348 East Mound street, this city, on and subsequent to May 28, 1906.

Plaintiff admits that she was engaged in the traffic in intoxicating liquors at 348 East Mound street from November 1, 1905, to May 28, 1906. She claims that she had paid her liquor tax to May 28, but that from and after said date she was not engaged in said traffic; that she sold her stock of liquors on May 26, and that the latter part of June she left said place, and about July 1 she stored her goods with the Buckeye Storage Company; that she kept no bar fixtures at said place; that prior to November 1, 1905, she had been in the saloon business elsewhere, where she had and used bar fixtures, but that when she moved to 348 East Mound street she had no use for bar fixtures.

She says that from May 28 to the last of June, when she left said house, she got beer over a back fence from a nearby saloon for herself; that on June 11, she admits that she got four quarts of beer for some

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visitors; that these visitors, four men, who came together, called for beer; that she told the men she did not keep it, and they asked her if she could get some; that one of the men gave her \$1, which she handed to one of the girls, living there with plaintiff, and that the girl got a quart bottle of beer; that three other bottles were also procured for the men; she says they were not paid for, except the men before they left threw some money in her lap and that she made no change; that she don't know how much money they threw in her lap. She says that the beer costs fifteen cents a quart bottle.

One of the girls, who says she went after the beer at a saloon near the rear of this house, says she paid fifteen cents a bottle for it, that she got four bottles, and that the men left \$4 for the four bottles; that plaintiff did not offer to give back change to the men, and that nothing was said about change.

The four men aforesaid, who visited said house on the night of June 11, and secured the four bottles of beer, were all inspectors under the state dairy and food commissioner, and had been sent there by said department to seek information if liquors were sold there, and if said place was liable for assessment as a place not on the duplicate, and report the same to the auditor of state. This is a duty devolved upon said department by Rev. Stat. 4364-14a (Lan. 7254).

Upon the report of said inspectors to the state auditor that plaintiff was liable to such assessment, the auditor of state caused the same to be entered upon the assessment duplicate of said Franklin county against the plaintiff, together with the 20 per cent penalty provided by said act.

The testimony of all four of said inspectors was adduced on the hearing. Their testimony is in substance, that about 9 o'clock on the night of June 11, 1906, they went to plaintiff's place at 348 East Mound street, this city, and after being admitted, one of the men proposed to buy a bottle of beer; that plaintiff said she did not sell beer, but would send for it, and said that they would have to give her \$1; one of them gave her \$1; all four of the men testify that plaintiff herself went out and presently came in with a bottle of beer; presently another one of the men proposed to get another bottle of beer; that plaintiff went out for it, and one of the men desiring to find out where she got it, as he stated, went along with her; he says as he passed through a rear room he saw three bottles of beer on a table there; that he saw plaintiff get the beer over a fence at a saloon near the rear of this house; the men testify to having purchased from plaintiff four bottles of beer; that before they left plaintiff proposed to treat, and one of the men followed her out; that she stepped on a ladder and tapped on the fence, and a man came out and gave her two more bottles, which made six bottles. They said that they asked her how much she wanted for

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the beer, and that she said \$1 a bottle, and that they paid her \$4 for the four bottles.

It is claimed by plaintiff that the evidence does not prove that plaintiff was at said time engaged in the business of trafficking in intoxicating liquors; that she did not keep liquors in her house, and that the fact that she took money from said men for the beer drank by them showing a profit to her would not, for only one such occasion, prove that she was in the business of trafficking in intoxicating liquors.

Laning 7256 (B. 4364-16) defines what is meant by the phrase "trafficking in intoxicating liquors," as used in Rev. Stat. 4364-9 (Lan. 7248), and provides that such phrase "means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in actual practice," etc. So that it does not necessarily mean that to engage in said business one must have and maintain a bar and bar fixtures, nor to have a stock of liquors constantly on hand.

It appears from the evidence that on this one evening the sale of said four bottles of beer, which cost plaintiff but fifteen cents a bottle, resulted in a profit to her of \$3.40. While there is no evidence before the court of sales made by her on any other occasions, yet from the above sales and the profits it can readily be seen that by an arrangement with a nearby saloon a person could carry on this traffic with considerable profit by conveniently providing the stock from such saloon in quantities such as the demands of her trade require.

If this were allowed it would defeat the very purpose of the statutes, and for that reason it is clearly within the definition of the phrase of "trafficking in intoxicating liquors."

The question here for determination is not, as counsel for plaintiff contend, whether one sale alone could constitute such person as engaged in said business. This must be taken in consideration with the evidence that the plaintiff was, up to May 28, by her own admission, engaged in said business at said place. Whether or not the fact that she did not make known her intention to continue said traffic from and after May 28, by having the same so entered on the tax duplicate, caused the department to send said inspectors to investigate on June 11, does not appear. But she having been openly engaged in said traffic at said place to May 28, after said date, when the act of March 28, 1906, increasing said tax to \$1,000 had gone into operation, and investigation was caused by the auditor of state, which resulted in discovering the plaintiff selling beer at said place, which she procured from a nearby saloon, at a profit of eighty-five cents per bottle to herself.

If the case stood alone on a single sale, with no other circumstances surrounding it, such as above stated, there would be greater difficulty in reaching a conclusion as to whether such sale sufficiently proved that

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she was engaged in the business of trafficking in intoxicating liquors. But the fact that soon after May 28, the time to which she had paid the tax, and in two weeks thereafter, she is found selling beer in the same place at a profit, would be sufficient in my opinion to bring her within the contemplation of the statute, and the auditor would be justified in placing her on the assessment duplicate.

For this reason I am of the opinion that the cases cited by counsel for plaintiff are not applicable to cases such as disclosed by the facts in this case.

By operation of the statute, on the facts of this case, the burden devolves upon the plaintiff to prove that she was not at said time engaged in said business. Upon the report of said inspectors to the auditor of state, and the auditor of state having caused the assessment to be entered against such person found to be engaged in said business, upon the assessment duplicate of the proper county by the auditor thereof, together with the penalty of 20 per centum, then by operation of Rev. Stat. 1104 (Lan. 2451), said duplicate shall be received as *prima facie* evidence on the trial of the amounts and validity of such taxes and assessments, and of the nonpayment thereof.

The evidence that she was not engaged in said business, and that she was not continuing the business after said May 28, does not overcome said *prima facie* case.

The circuit court in *Simpson v. Serviss*, 2 Circ. Dec. 246 (3 R. 433), held that where a person, having made return that his business is confined exclusively to malt or vinous liquors, or both, thereafter, during the assessment year, makes a single sale of any other intoxicating liquors, the assessment upon his business is thereby increased, as provided by Sec. 5 of said act of May 14, 1886 (83 O. L. 156).

The above case is authority, and controls the case at bar so far as a single sale is concerned in connection with the other fact that plaintiff was conducting said business openly at said place shortly before said time in question.

The fact that the defendant made no demand at plaintiff's place of business before making said levy on her said goods and chattels, is not material now in view of the fact that both the parties and the said goods and chattels are before the court in this action for a full determination of the issues between the parties.

Penalties are assessed by way of punishment, and it is held in this state that such cannot be refunded. *Simpson v. Serviss, supra*. The minimum assessment under the act of March 28, 1906, is \$200. No sum less than that can be assessed. The assessment above said sum was refunded on the assessment duplicate.

The full amount assessed, which is required by statute, on the duplicate against plaintiff was \$961.54; the 20 per centum penalty there-

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on was \$192.30. There was a refunder on the duplicate of the original amount assessed reducing the same to the minimum of \$200; this, together with the penalty of \$192.30, makes \$392.30; to this will be added 4 per centum collection fees and costs by distress and sale, as provided by Lan. 7251 (B. 4364-12), making in all \$430.76, which amount I find the defendant is entitled to recover from the sale of said goods and chattels of the plaintiff so levied on. I find that the sheriff's fee of \$3 is included in said item of 4 per centum.

I am unable to find from the evidence before me what amount is due the said Buckeye Storage Company, or that the defendant is under obligations to account to said company. It seems from the evidence that said company has charged the same against the plaintiff, and consequently will be relegated to its lien on said goods for its charges, subject to the lien of defendant for the amount found as aforesaid.

My finding therefore is against the plaintiff, and in favor of the defendant as aforesaid. The temporary restraining order is dissolved, and defendant is granted leave to sell said goods and chattels in satisfaction of the above amount so found, and the costs of this action are adjudged against the plaintiff.

EQUITY—INSURANCE—QUO WARRANTO.

[Superior Court of Cincinnati; Special Term, February 28, 1907.]

WALLACE BURCH ET AL. V. BENNET F. COAN ET AL.

1. JURISDICTION OF EQUITY TO INQUIRE INTO PROCEEDINGS OF CORPORATION OFFICERS, INVOLVING VALIDITY OF THEIR ELECTION.

A petition by policy holders in a mutual life association, which makes the managing agent and directors defendants, alleging fraud and breach of trust on the part of the managing agent in bringing about, through a misuse of proxies, the election of directors friendly to his interests, whereby he has secured from the directors a contract alleged to be detrimental to the interests of the plaintiffs and the corporation, confers jurisdiction on a court of equity, notwithstanding the validity of the election of directors, and therefore their title to office is incidentally involved.

[For other cases in point, see 4 Cyc. Dig., "Equity," §§ 144-202.—Ed.]

2. COURT OF EQUITY CANNOT OUST OFFICERS OF A CORPORATION.

But while in such a case equity may set aside the contract, and find the election invalid, and enjoin the directors pending a determination of the question of their title in a court of law, it is without jurisdiction to oust them from office.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 1209-1226;

7 Cyc. Dig., "Quo Warranto," §§ 93-101.—Ed.]

[Syllabus approved by the court.]

DEMURRER to petition.

Superior Court of Cincinnati.

J. C. Healy, M. C. Slutes and W. F. Boyd, for plaintiffs.

H. D. Peck and W. N. Tuller, for defendants.

HOFFHEIMER, J.

Plaintiffs are policy holders in the Ohio Mutual Life Insurance Company. Defendant, Bennet F. Coan, has been agent and general manager of said company for many years, and his codefendants are persons who, it is charged, claim to have been elected directors of said The Ohio Mutual Life Insurance Company. The petition is voluminous and it is unnecessary for the purposes of this demurrer to refer otherwise than in a general way to the allegations of the petition or to the relief sought.

The demurrer interposed by defendants to the petition raises a jurisdictional question. The defendants contend that the petition in its entirety is directed to testing the validity of the election of the board of directors of said company, of the persons named as codefendants of Coan. In other words, it is claimed that their action is an attempt to oust officers of a private corporation and that inasmuch as the common law and the statutes furnish the remedy in quo warranto, and that, as this is a specific and adequate remedy, equity is ousted of any possible jurisdiction.

Plaintiffs, on the other hand, contend that the purpose of the action and the relief sought is not the testing of official title, solely, but they claim equitable relief on other and special grounds such as fraud and breach of trust, although it is stated that the title of the pretended directors is incidentally involved in the controversy. Under such circumstances, it is claimed on behalf of plaintiffs, equity will inquire into the whole matter, including the question of the validity of the election of said pretended directors, and declare same void if necessary.

From such examination of the authorities as I have been able to make since the submission of this matter on Monday, I may say that there is no inherent power in a court of equity to try disputed title to corporate office either in a public or private corporation, where that is the sole question before the court. The law furnishes an ample remedy. *State v. Buchanan*, Wri. 233; *State v. Pollner*, 10 Circ. Dec. 141 (18 R. 304); *First Presbyterian Soc. v. Smith*, 12 Ohio St. 248; *Hullman v. Honcomp*, 5 Ohio St. 237; *Owen v. Whittaker*, 20 N. J. Eq. 122; *Bedford Springs Co. v. McMeen*, 161 Pa. St. 639 [29 Atl. Rep. 99]; *Carmel Nat. Gas & Imp. Co. v. Small*, 150 Ind. 427 [47 N. E. Rep. 11].

And it seems even when fraud is alleged the remedy is still at law. In *Trinity Church v. Warden* it is held, in substance, that a court of equity cannot sustain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable in a court of law, the appropriate remedy being by proceedings at law in the nature of

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quo warranto. Nor is the fact that relief is claimed upon the ground of fraud sufficient to warrant a departure from the rule or to justify a court of equity in such case in granting relief by injunction. *Trinity Church v. Warden*, 3 Dec. Re. 524-526.

The general rule prescribing equity jurisdiction in this regard is however subject to a recognized qualification. Where the question as to the validity of the election of officers is incidental and collateral to other special matters involved, which in their very nature make it proper for equity to intervene, as for example, where breach of trust is involved or where an injunction is necessary to prevent a misappropriation or waste of corporate funds, or where fraud is being committed which cannot be prevented save by a court of equity, then the authorities warrant equity in taking hold and in hearing the whole controversy even if, for the purpose of granting complete relief, it becomes necessary to inquire into the validity of the election. 3 *Clark & Marshall, Priv. Corp.* 1987, 1988; *Johnston v. Jones*, 23 N. J. Eq. 216; *Nathan v. Tompkins*, 82 Ala. 437 [2 So. Rep. 747]; *Moses v. Tompkins*, 84 Ala. 613 [4 So. Rep. 763]; *Putnam v. Sweet*, 2 Pinn. (Wis.) 302; *Bartholomew v. Lutheran Congregation*, 35 Ohio St. 567; *Lutterby v. Brewing Co.* 12 Dec. 67; High, Extra. Leg. Rem. Secs. 617 to 621; *Messenger v. Trinity Church (Wardens)*, 8 Dec. Re. 227 (6 Bull. 397); *Baggiano v. Manufacturing Co.* 99 Ill. App. 509.

While equity, it is true, does not concern itself with the internal affairs of a corporation, nevertheless there are elements present in this case, conceded by the demurrer, which are properly cognizable in equity. Fraud and breach of trust are charged against the managing officer, to state it very generally, in bringing about by the misuse of proxies the election of directors friendly to his interests, for the purpose of securing for his own private benefit a certain contract alleged to be detrimental to the interests of plaintiffs and the corporation, and that this was known to said managing officer. And further that said plan had been agreed upon by said managing officer and his codefendants (who were elected by use of said proxies) before the alleged pretended election and after said election the contract complained of was executed by said defendants in furtherance of the plan.

The conceded facts, in view of the fiduciary relations sustained by the managing officer, justify the scrutiny of equity. As to the fiduciary character of the managing officer we need only refer to authorities in our own state. *Armstrong v. Huston*, 8 Ohio 552; *Caldwell v. Caldwell*, 45 Ohio St. 512 [15 N. E. Rep. 297]; *Long v. Mulford*, 17 Ohio St. 485, 505 [93 Am. Dec. 638].

Bearing in mind, then, that relief is sought against the contract involved in the election of these pretended directors, if defendants' con-

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tention were correct, and the petition were dismissed and plaintiffs remitted to law, what relief could be had as against the contract?

Quo warranto inquires into the validity of the election only. And as the circuit court and the Supreme Court have no original equity jurisdiction, it would follow that plaintiffs would be destitute of power to protect private rights. They would be powerless to prevent the carrying out of alleged fraudulent acts growing out of the breach of trust as alleged in this case. Under such a view what becomes of defendants' contention that the law affords these plaintiffs full, complete and adequate relief?

While, as I have stated, equity will inquire into the validity of the election under the circumstances named, still, I do not think its judgment can go to the extent of ousting the officers, if it be found their election was invalid. Particularly so, where, as in this case, the petition sets out that they have taken hold and are in possession.

Johnston v. Jones, 23 N. J. Eq. 216, considered a leading case on this question, would seem so to hold. See also, *Garmire v. Mining Co.* 93 Ill. App. 331, 333; also, 5 Pomeroy, Eq. Jurisp. Sec. 307.

This is a matter, however, that goes to the extent to which the court's judgment may go, but would not prevent the court from passing on the validity of the election, even though such finding might not be pleaded as *res adjudicata* in a subsequent proceeding in quo warranto. *Lutterby v. Brewing Co. supra.*

In view of the special equitable elements pleaded, although involving incidentally the question of the validity of an election, I must hold that equity has full jurisdiction to determine the matters in controversy. If the court, upon a hearing, should set aside the contract or find the election invalid, while it may not be able to oust the alleged pretended directors, it may still enjoin them pending a proper determination of the question of title in a court of law. The *status quo* would thus be preserved until that matter has been adjudicated or a legal election held.

Demurrer overruled.

Morgan v. Hilb.

MASTER AND SERVANT—PLEADING.

[Superior Court of Cincinnati, Special Term, 1907.]

CHARLES A. MORGAN V. MANIS HILB ET AL.

1. SUFFICIENCY OF ALLEGATION OF NEGLIGENCE OF EMPLOYER.

An action by a servant for injuries alleged to have been sustained through the negligence of the master in knowingly putting the plaintiff at work with an incompetent fellow servant, to wit, one who could not speak the English language, must fail if the pleader has not clearly shown the relation between the injury suffered and the incompetency alleged.

[For other cases in point, see 6 Cyc. Dig., "Master and Servant," §§ 606-636; "Negligence," §§ 489-495.—Ed.]

2. PETITION DISCLOSING ASSUMPTION OF RISK OF PLAINTIFF SUBJECT TO DEMURRER.

The allegation of a servant that he expressed unwillingness to work with one who could not speak the English language, but went on with the work when told to do so, states a case which clearly falls within the doctrine of assumed risk, and a demurrer to the petition must be sustained.

[For other cases in point, see 6 Cyc. Dig., "Master and Servant," §§ 436-518, 639-643.—Ed.]

[Syllabus approved by the court.]

DEMURRER.

T. L. Michie and A. C. Fricke, for plaintiff.
Robertson & Buchwalter, for defendants.

HOSEA, J.

This action is by a servant against a master for injuries attributed to the act of a fellow servant who could not speak the English language, while plaintiff could speak no other. Such ignorance on the part of the fellow servant is assumed to be incompetence; and the master is sought to be held liable upon the theory that he knowingly employed such incompetent fellow servant and set him to work with plaintiff—both fellow servants being employed in the capacity of common laborers.

Even assuming that ignorance of the prevailing language presumes incompetency, the pleading must clearly show a relation of cause and effect between the injury suffered and the incompetency alleged in order to sustain the action. The act of the fellow servant producing the injury must be shown to be a negligent act due to his incompetency. No such relation of cause and effect, however, is shown in the present case nor is the act itself so circumstantially averred as to show negligence.

Again, while it is the duty of the master to select competent servants, this term has relation to the requirements of the business in which the parties are engaged and means servants of sufficient care, skill, prudence and good habits, as will make it probable that they will

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not cause injury to each other. But it does not follow as a logical or legal sequence that because a laborer does not comprehend the language he may not be quite competent in all the particulars indicated. The pleader seems to have recognized the incompleteness of the logical syllogism, and adds an allegation that the master was negligent in not furnishing plaintiff with a "code of signals," whereby he could communicate with his fellow servant; but there is nothing in the case as pleaded to indicate the necessity of resorting to this rather novel doctrine.

Our Supreme Court has established the rule in Ohio that a servant is conclusively presumed to appreciate dangers from defects of which he has, or in the exercise of due care might have, knowledge. *Pennsylvania Co. v. McCurdy*, 66 Ohio St. 118 [63 N. E. Rep. 585].

Also that if one party has been negligent, the other party who has, or is chargeable with, such knowledge must act with reference to such negligence and cannot shut his eyes and claim that he relied upon a proper performance of duty by the other party. *Coal Co. v. Estievenard*, 53 Ohio St. 43, 44 [40 N. E. Rep. 725].

Still again, to constitute a cause of action in such a case a plaintiff must aver either that he was without knowledge of the defect, and had not equal means of knowing with the master, or that having knowledge he communicated that knowledge to his master, and continued at work on a promise to remedy the defect. *Chicago & O. Coal & Car Co. v. Norman*, 49 Ohio St. 598, 607 [32 N. E. Rep. 857].

These principles apply with equal force to defects of the character claimed in this petition.

The only allegation in the petition that at all bears in this direction is, that plaintiff informed the foreman before going to work of his "unwillingness" to work with the fellow servant in question, but was told to go to work and did so. This indicates no promise on the part of the master, but does indicate a knowledge of the assumed defect on the part of the plaintiff. In such case the master is entirely justified in insisting that the servant go on with the work under existing conditions, and even a threat to discharge the servant is not coercion.

The case as pleaded plainly falls under the class of assumed risks; and the character of the fellow servant is within such class. *Shearman & Redfield*, Negligence Sec. 209.

Taking the petition as a whole, therefore, in any aspect, it does not state facts sufficient to constitute a cause of action under the laws of this state, and the demurrer is well taken.

Demurrer sustained.

Whitely v. Arbogast.

CONSTITUTIONAL LAW—TAXATION.

[Clark Common Pleas, May, 1907.]

*MARY E. WHITELY v. CLARENCE W. ARBOGAST, TREAS.

1. THE MONTHLY AVERAGE AMOUNT OF MONEY INVESTED IN MUNICIPAL COUNTY AND TOWNSHIP BONDS NOT REQUIRED TO BE LISTED UNDER REV. STAT. 2737 (LAN. 4078), SUBD. 16.

City, village, hamlet, county and township bonds in this state, being recited in detail as exempt from taxation by Art. 12, Sec. 2 of the constitution as amended (97 O. L. 652), which also specifically exempts "bonds of the state," are not included in the phrase "bonds or other securities" of the state as used in Rev. Stat. 2737 (Lan. 4078), Subd. 16, requiring the listing of "the monthly average amount * * * of all moneys invested in or converted into 'bonds or other securities * * * of this state' * * * to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April." *Expressio unius est exclusio alterius.*

[For other cases in point, see 7 Cyc. Dig., "Taxation," §§ 12-15, 242-244, 399.—Ed.]

2. SAME.

Municipal, county and township bonds, not being exempt from taxation when Rev. Stat. 2737 (Lan. 4078), Subd. 16, was enacted, cannot be included in the term "bonds or other securities of the state," and as the legislature has failed, since the amendment of Art. 12, Sec. 2 of the constitution, to require the average monthly amount of moneys invested in such securities to be listed by the taxpayer, the same is not subject to taxation.

[Syllabus approved by the court.]

DEMURRER to petition for injunction.

Martin & Martin and G. S. Dial, for plaintiff.

J. B. McGrew and L. E. Laybourn, for defendant.

KUNKLE, J.

The petition in substance states that, as of the day before the second Monday of April, 1906, the plaintiff, as the owner, returned for taxation personal property of the amount of \$4,500, being all of the personal property of which she was then the owner, excepting certain bonds hereinafter described; that in April, 1905, she had returned all of her personal property for taxation, amounting to \$13,850, which was all of the personal property of which she was then owner; that between April, 1905, and April, 1906, she purchased certain bonds which are described in detail in the petition, and in substance are as follows, viz.: On December 6, 1905, \$2,500 of municipal and county bonds; on January 17, 1906, \$5,000 of municipal and county bonds; on March 5, 1906, \$2,000 of municipal bonds, and on March 20, 1906, \$1,000 of county bonds; all of said county and municipal bonds were

*Affirmed by the Clark circuit court.

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issued by municipalities and counties located in the state of Ohio; that in order to purchase such bonds she converted her personal property into money which theretofore, in April, 1905, she had returned for taxation, and with said money, on the dates above mentioned, purchased nontaxable bonds of counties and municipalities within the state of Ohio, as above set forth; that in April 1906, she did not return for taxation the money invested in any of said bonds for any part of the year during which they were purchased; that said bonds were purchased by her as and for a permanent investment to obtain the highest net rate of interest thereon, and not for the purpose of avoiding the payment of taxes; that she is still the owner and holder of said bonds; that the auditor of Clark county, Ohio, has certified to the defendant treasurer an addition to the return of the personal property of the plaintiff, for the year 1906 in the sum of \$7,500, on account of said municipal and county bonds, and has assessed a tax against plaintiff in the sum of \$203.75, as taxes thereon, and the defendant threatens to, and unless restrained by an order of this court, will enforce the collection of said taxes; that said auditor claims to have made said addition upon the tax duplicate in pursuance of, and acting under, paragraph 16 of Rev. Stat. 2737 (Lan. 4078); that said auditor claims that plaintiff should be charged, under said paragraph, with "the monthly average amount or value * * * of all moneys, credits or other effects" held within the year preceding the second Monday in April, 1906, or controlled by her, which was invested in bonds of this state, and that the bonds hereinbefore recited come within the designation of bonds of the state of Ohio; that said bonds are not bonds of the state of Ohio, within the meaning of said paragraph 16, and are not included in said paragraph, and that said county auditor had no authority to make said addition to plaintiff's tax return, and said treasurer has no authority to collect the same for the reason that the money invested in said bonds was not subject to taxation for any part of the year for which the same is sought to be taxed, as plaintiff did not have any portion of said money on tax listing day. The plaintiff asks that the defendant be enjoined from collecting or attempting to collect said taxes.

The defendant demurs on the ground that the petition does not state facts sufficient to constitute a cause of action. The demurrer admits the truthfulness of the facts set forth in the petition. In addition to this legal presumption, we understand it is conceded by the parties that the facts are correctly stated in the petition.

Revised Statute 2736 (Lan. 4077), provides, in substance, that every "person required to list property shall annually * * * make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, annuities, or otherwise,

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in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof."

Revised Statute 2737 (Lan. 4078) provides what such statement, so required to be made out and delivered to the assessor, shall contain, and the order in which the same shall be stated. The first fifteen provisions of this section have no bearing upon this case. The sixteenth provision is as follows:

"The monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April."

Revised Statute 2737 (Lan. 4078) was enacted many years ago. No amendment has been made to this section since 1868. Article 12, Sec. 2 of the constitution of Ohio, as it existed at the time Subd. 16 of Rev. Stat. 2737 (Lan. 4078) was adopted, provided—

"Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money * * * but burying grounds, public schoolhouses, * * *, and personal property, to an amount not exceeding in value two hundred dollars, for each individual, may, by general laws, be exempted from taxation."

At the November election of 1905, Art. 12, Sec. 2 of the constitution was amended.

On the day preceding the second Monday of April 1906, said Art. 12, Sec. 2 (97 O. L. 652), provided that—

"Laws should be passed taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money, excepting bonds of the state of Ohio, bonds of any city, village, hamlet, county, or township in this state, and bonds issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds shall be exempt from taxation; but burying grounds, public schoolhouses, * * * and personal property, to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempted from taxation."

On the day preceding the second Monday of April, 1906, all of the bonds designated in the plaintiff's petition were exempt from taxation by virtue of the said amendment to Art. 12, Sec. 2 of the constitution, and the plaintiff claims that no portion of the money so invested by her in said bonds, between the day preceding the second Monday of

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April, 1905, and that of April, 1906, is taxable for any portion of the year 1906.

The defendant claims that plaintiff should have returned for taxation the average amount or value of all moneys within that year converted by her into the bonds in question, to the extent that she held such bonds on the day preceding the second Monday of April, 1906, and that such average amount of the money was subject to taxation; that Subd. 16 covers all bonds issued either by the state or by any political subdivision of the state, such as counties, cities, etc., and that, as all laws in reference to the subject of taxation must be uniform, Subd. 16 should be held to embrace within its terms all bonds which are at any time exempted by law from taxation.

The determination of this contention depends upon the construction given said Subd. 16.

Counsel for defendant has submitted a written opinion of the attorney-general of this state of date November, 1906.

This opinion, which was rendered upon a similar question, recites the various statutory and constitutional provisions of Ohio in reference to the subject-matter, and bases the following opinion thereon, viz.:

"In construing the paragraph quoted from Sec. 2737 [Lan. 4078] Rev. Stat., the bonds of the several subdivisions of the state, such as cities, villages, hamlets, counties and townships, should be included among the nontaxable bonds or securities of the state of Ohio. Such divisions are public agencies in the system of the state government and their bonds, since the first day of January, 1906, are exempted from taxation. Some question may arise as to such bonds being included in the operation of Sec. 2737 [Lan. 4078] Rev. Stat., but as any other construction would create an unconstitutional exemption and discrimination in favor of certain nontaxable investments, and against other forms thereof, it should not be adopted unless the language employed necessarily excludes such view, which in my opinion it does not."

An opinion of the attorney-general of our state should be respected, but as it neither binds nor protects the court which follows it, the same is entitled to only such consideration as the reasons given for the opinion warrant.

The following are some of the well-established rules which must govern the court in the interpretation of a statute, viz.:

Where a statute is plain and unambiguous it construes itself, and whether its provisions are wise or equitable, courts have no authority by judicial construction, to read anything into or out of it. *Fronce v. Nicholas*, 12 Circ. Dec. 472 (22 R. 539); *Slingluff v. Weaver*, 66 Ohio St. 621, 627 [64 N. E. Rep. 574].

The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body

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which enacted it. The question is not, What did the general assembly intend to enact? but What is the meaning of that which it did enact? That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

Courts cannot correct supposed errors, omissions or defects in legislation or vary, by construction, the contracts of parties. The office of interpretation is to bring sense out of the words used and not to bring sense into them. *Slingluff v. Weaver, supra*.

It is not the province of courts to relieve against the mistakes or omissions of the legislature, however unwise or unjust may be the consequences. Therefore if a reasonable intention cannot be fairly inferred from any language used in the statute the courts must construe accordingly. *Gorham v. Steinau*, 10 Dec. 131 (7 N. P. 478).

The constitution does not execute itself and if the legislature simply fails in its constitutional duty to pass laws taxing every kind of property, no tax can be collected on such property. Without express authority of law no tax either for state, county or municipal purposes, can be levied. *Zanesville v. Richards*, 5 Ohio St. 589 593; *Exchange Bank v. Hines*, 3 Ohio St. 1.

Another well recognized rule in the construction of a statute is, that the expression of one thing is the exclusion of another. *Mack v. Brammer*, 28 Ohio St. 508, 515.

Many additional authorities might be cited sustaining the above propositions, but we deem the same unnecessary. Subdivision 16, prior to the recent amendment of the constitution, was held constitutional by our Supreme Court in the case reported in *Shotwell v. Moore*, 45 Ohio St. 632 [16 N. E. Rep. 470], and by the United States Supreme Court, in the case of *Shotwell v. Moore*, 6 O. F. D. 500 [129 U. S. 590; 9 Sup. Ct. Rep. 362; 32 L. Ed. 827], but these decisions do not assist in determining whether the securities in question are included in the phrase "bonds or other securities of the state."

If the construction is given Subd. 16 as contended for by the plaintiff, it may follow that Subd. 16 would be unconstitutional, as suggested by the attorney-general. This does not assist us, however, in arriving at a construction of Subd. 16.

This is not an action in which the plaintiff asserts the unconstitutionality of Subd. 16. She merely asserts that the legislature, which is the sole authority for enacting tax laws, has failed to make any provision by which the money invested by her in the bonds in question, during the year prior to April, 1906, can be taxed for any portion of that year. It would be conceded that the legislature has authority to provide for such taxation. The question is, Has it so provided?

If the legislature's failure to provide such additional legislation causes Subd. 16 to be unconstitutional, by reason of the failure to pro-

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vide a uniform method of taxation, then this is a defect which can be cured, not by the courts, but only by the legislature. Suppose the legislature should pass an act relating to Clark, Champaign and Green counties. Under our Supreme Court decisions this would be special legislation and therefore unconstitutional. It doubtless would not be considered a very sound decision which attempted to avoid the unconstitutionality of such an act by holding that the legislature after all really meant to extend the benefits of the act to all of the counties within the state.

The language in Subd. 16 is plain. It states that the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects within that time, invested in or converted into bonds, or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April, shall be returned: Bonds of the United States or of this state.

The legislature, at the time Subd. 16 was enacted, did not intend to require a return of the average amount of money invested in county, municipal, township and school bonds. Such bonds were not then exempt from taxation.

The constitutional amendment of 1905 exempted these bonds from taxation. The legislature could not have had in mind the money invested in such bonds, when Subd. 16 was adopted. If they are included within the term, "bonds or other securities of the state," what would be the occasion for reciting them in detail in the constitutional amendment, as follows: "Bonds of any city, village, hamlet, county or township in this state?"

What are bonds or other securities of this state? Bouvier defines securities as, "written assurances for the return or payment of money. Evidences of indebtedness." Bonds are defined as "Instruments in writing that bind a party to do a certain thing."

Cities, counties, townships, etc., are political subdivisions of the state, but under the above definitions of bonds and securities, we do not think it is possible to designate bonds or other securities of counties, municipalities and townships, as bonds or securities of the state.

Under Subd. 16, the taxpayer is only required to list and return the average value of money invested in bonds or other securities of the state.

There is no good reason why the legislature should not require the taxpayer to list and return the average amount of money invested during the year in municipal, county and township bonds. We have no doubt but that such a requirement will be enacted when the attention of the legislature is called to this omission.

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While we are satisfied that the failure to amend Subd. 16 has been an omission upon the part of the legislature, yet that does not warrant us in reading into the subdivision something which the legislature has not enacted.

We are limited to construing what has been enacted, and cannot supply nor add thereto. We are not permitted to determine what the law should be, nor what the law doubtless will be, when the attention of the legislature is called to the omission.

The demurrer will be overruled.

BLACKMAIL—INDICTMENTS AND INFORMATIONS.

[Sandusky Common Pleas, May 11, 1907.]

STATE OF OHIO V. A. SKRANSEWFKY ET AL.

1. SUFFICIENCY OF CHARGE OF SENDING THREATENING LETTER.

An indictment for blackmail, under Rev. Stat. 6830 (Lan. 10433), charging the defendant with having sent a written communication to the prosecuting witness, charging him with having fondled, kissed, caressed, and driven about in the nighttime with another's wife, with the intent to extort money, should charge directly that the defendant knowingly sent the accusation as charged; this is sufficiently charged, though in an involved and inartful manner, by an allegation that he knowingly accused by knowingly sending the said letter.

2. SAME, CHARGING BLACKMAIL TENDING TO DEGRADE AND DISGRACE.

A charge in such an indictment that the defendant accused the other of certain things, "thereby calculating and intending to degrade and disgrace," does not directly charge that this accusation of the defendant would tend to degrade and disgrace, and is insufficient.

3. MATTERS OF CONCLUSIONS NEED NOT BE ALLEGED IN AN INDICTMENT.

An indictment for blackmail, which fails to allege the thing the prosecuting witness is accused of doing as immoral conduct, but leaves it to be inferred from the facts charged, is valid, as these omissions are only conclusions to be drawn from the accusations, and require no proof beyond that of the accusations themselves.

4. CHARGES, IF TRUE, MUST BE SUCH AS CONSTITUTE AN OFFENSE.

If all the facts alleged in an indictment may be true and constitute no offense, the indictment is insufficient. Hence charging defendants with accusing L of such familiarity with E, a married woman, as would not be improper within close family ties is insufficient to charge them with accusing him of immoral conduct tending to degrade and disgrace him, unless by apt words such relationship is negated in the indictment.

[For other cases in point, see 5 Cyc. Dig., "Indictments and Informations," §§ 125-142.—Ed.]

[Syllabus by the court.]

M. W. Hunt, for plaintiff.

B. F. Ritchie, Garver, Garver & Garver, Jesse Stephens and Ulery, Martin & Webster, for defendants.

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BABCOCK, J.

The sufficiency of the indictment is attacked by the defendants by motions to quash and by demurrers. It charges that the defendants unlawfully, wrongfully, knowingly and maliciously, did falsely accuse one George Lang of immoral conduct; to wit, that of fondling, kissing, caressing and driving about the country alone in the nighttime, and substantially all of the night, with one Eva Entsminger, he, the said George Lang, well knowing that she, the said Eva Entsminger, was the wife of one Arthur Entsminger, thereby calculating and intending to degrade and disgrace the said George Lang, by then and there wilfully and knowingly sending and delivering to said George Lang a certain written petition, which said written petition is as follows: (setting forth the same), with the intent then and thereby, and by means of said false and unlawful accusation, and with menaces, unlawfully, wilfully and knowingly to extort certain money from said George Lang, the property of the said George Lang, contrary to the form of the statute, etc.

Revised Statute 6830 (Lan. 10433), defines the offense of black-mailing, and includes within its provisions several classes of offenses. By its terms it is made criminal—

1. To demand verbally or by letter, or writing, or written or printed communication sent or delivered, with menaces, any chattel, money or valuable security. Or,

2. To accuse or knowingly send or deliver any letter, etc., accusing or threatening to accuse any person of a crime punishable by law, with intent to extort or gain from such person any chattel, etc. Or,

3. To accuse, or knowingly send or deliver any letter, etc., accusing or threatening to accuse any person of immoral conduct which, if true, would tend (1) to degrade and disgrace such person, (2) or to expose or publish his infirmities or failings, (3) or in any way to subject him to the ridicule or contempt of society, with intent to extort or gain from such person any chattel, etc.

The offense sought to be charged in this indictment is that of knowingly sending a written communication to George Lang, accusing or threatening to accuse him of immoral conduct which, if true, would tend to degrade and disgrace him, with intent to extort or gain from him, etc.

(a) It is necessary to charge the defendants with knowingly sending or delivering a letter or writing, accusing said Lang of immoral conduct. The indictment charges that the defendants knowingly accused Lang of immoral conduct by then and there sending and delivering to him a certain written petition containing the alleged accusation.

(b) It is necessary to charge that the accusation was of something which amounted to immoral conduct. The indictment does not allege

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that the thing of which Lang was accused is immoral conduct, but leaves this to be inferred from the facts charged.

(c) The statute provides that the accusation must be such as, if true, would tend to degrade and disgrace. The indictment alleges that the defendants did certain things "thereby calculating and intending to degrade and disgrace." There is no direct allegation that this accusation would tend to degrade and disgrace.

(d) The accusation named in the statute must be such as tends to degrade and disgrace, or to expose or publish infirmities or failings, or to subject one to the ridicule or contempt of society. It is contended that the inference of immoral conduct cannot be drawn from the words charged even though the allegation charging it to be immoral conduct may properly be omitted from the indictment. The claim is, that the alleged accusation charged nothing which, if true, would tend to degrade and disgrace Lang, if his relationship to Mrs. Entsminger was such as to justify such familiarity; and, on the subject of the relationship, the indictment is silent. It is contended that, for aught appears in the indictment, the two may have sustained the relation of father and daughter, or, betrothed lovers; in either of which situations the accusation would not tend to degrade or disgrace. The claim that they may have sustained such relation, for aught appearing in the indictment, is predicated on the proposition that the recital of "Lang's well knowing that she, the said Eva Entsminger, was the wife of one Arthur Entsminger," is not an allegation that she was, in fact, his wife.

On the other hand, it is claimed that the petition, charging alienation of affections, is copied into the indictment, is part of it and shows the true relation between them; also, the recital of knowledge of this fact is a sufficient allegation of the fact, and, finally, that these are matters of evidence to be shown in defense, if they exist at all, and need not be negated in the indictment.

It is a rule of pleading that operative facts must be directly alleged, while those upon which they operate, as well as those by way of inducement, may be charged indirectly and by way of recital. In an early case, *Dominus Rex v. Dominam Lawley*, 2 Stra. 904, the court of kings bench, held:

"*Sciens* in an indictment is a good averment.

"She moved in arrest of judgment after conviction on an information for attempting to persuade a witness not to appear and give evidence against Japhet Crooke for forgery, and the exception taken was, that it was not positively averred that Crooke was indicted; it was only laid, that she, *sciens* that Crooke had been indicted and was to be tried, did so and so; whereas in all criminal cases the fact must be positively alleged, and not by inference.

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"But the court upon consideration held it was well enough; and that there is no real difference between indictments and actions, where the gist of the action must be positively averred. *Dans plagam mortalem; warrantizando vendidit*; receiving stolen goods knowing them to be stolen, are all as loose. So is the case of keeping a dog knowing him to be accustomed to bite sheep. And there is no inconvenience; because, if there was no such indictment proved at the trial, the defendant must have been acquitted. *Vide* 1 Sid. 183, 337; 2 Sid. 127; Salk. 686; 2 Lev. 208; 5 Co. 120; 2 Roll. Abr. 82, pl. 4, 9, 12; Dy. 69. a. Appendix at the end of the State Trials 50, where it is laid that the defendant *satis sciens* Sir Thomas Armstrong to have conspired the death of the king, and to have fled for the same, the defendant nevertheless traitorously remitted money to him for his support. *Judicium pro rege*, and the defendant was fined three hundred marks, and to suffer one month's imprisonment."

The doctrine is, that an averment which is incidental, as being introductory or collateral, or an inducement to something else, need not be set down in the indictment either so much in detail or with such directness as those parts are required to be which constitute the gist of the offense. 1 Bishop, New Criminal Procedure Sec. 554; 1 Chitty, Crim. Law 231.

"Under 4 and 5 Phil. & M. Chap. 8, which made it punishable for one 'above the age of fourteen' to steal an heiress, the age, which was one of the two pillars of the offense, was held to be sufficiently set out by charging that the defendant 'being above the age of fourteen years' did the act." *Rex v. Moor*, 2 Mod. 128.

The customary manner of charging in the indictment the receiving of stolen property, illustrates the rule. The approved forms universally charge the receiving by direct allegation; but the fact of the property's having been stolen is set forth by recital.

Applying this rule, the indictment must charge directly that the defendants knowingly sent the accusation; I am of opinion this is charged by an allegation that they knowingly accused by knowingly sending, etc., although it is done in an involved and inartificial manner. The recital of Lang's well knowing that Eva was the wife of Arthur Entsminger is in line with established precedents and a sufficient, though loose, allegation, that she was his wife.

There is no finding that the accusation against Lang was a charge of immoral conduct nor that it was such immoral conduct as tends to degrade and disgrace. Do these omissions invalidate the indictment? They are only conclusions to be drawn from the accusation, and require no proof beyond that of the accusations themselves. The court will determine from the things charged, whether they import immoral conduct, and whether they tend to degrade and disgrace, if true. They are con-

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clusions to be drawn from the facts and do not enlarge the issue of fact to be established by the testimony.

"It is an established rule of pleading that facts and not conclusions of law should be pleaded." *Whiting v. State*, 48 Ohio St. 220 [27 N. E. Rep. 96]. Minshall, J., in the opinion, page 233, says:

"The object of all pleading is to advise the opposite party of the nature and character of the claim or charge made against him, so that he may come prepared to meet it with evidence. In the application of this principle it has become a settled rule, both in civil and criminal proceedings, that facts, and not mere conclusions from them, should be stated. * * * Where the facts have been averred, the law attaches the proper legal conclusions; and their averment in the indictment adds nothing to its substance as a pleading."

It is a mark of good pleading to avoid doubtful questions by a careful following of the terms of a statute defining the crime. Yet, I am of opinion that the absence of these allegations does not invalidate this indictment.

It is claimed that we may read the allegations of the petition, which is set forth in full in the indictment, and thereby learn Lang's true relation to Mrs. Entsminger, and, consequently, the true nature of the immoral conduct alleged, as well as its tendency to degrade and disgrace. This petition is an ordinary one, charging alienation of affections, and the defendants are charged with having sent it to Lang with intent to extort money instead of filing it in court. If we may treat the allegations of this petition as allegations of the indictment, then Lang is charged with practicing the arts of the seducer; but it is clear that the grand jury does not find the declarations of this petition to be true, but, that the defendants knowingly sent it to Lang with intent to extort money. The instant we make the declarations of this petition findings of the grand jury and allegations of the indictment, we have discredited the criminal charge, for it is not criminal to make a demand in good faith for compensation for a wrong sustained. The finding in the indictment is, that the so-called petition was sent by the defendants to Lang; not that anything charged therein was true. The indictment cannot be helped out in this way.

This brings us to the last claim of defendants. It is, that the accusation as set forth did not charge Lang with immoral conduct tending to degrade and disgrace him (1) because it does not show that he sustained such relations to Mrs. Entsminger as made his alleged conduct improper, and, (2) because such conduct, if true, cannot be so interpreted regardless of the relationship. The whole charge in the indictment is, that Eva was the wife of Arthur Entsminger; that Lang knew this fact; that he fondled, kissed and caressed her, and drove about the country alone in the nighttime with her. I am clearly of opinion that

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if he were her father this charge, if true, would not constitute immoral conduct tending to degrade and disgrace him. On the subject of the relationship of the parties, the indictment is silent. What is the legal inference? In *Fouts v. State*, 8 Ohio St. 98, 113, Bartley, C. J., says:

"It is laid down by Archbold, in his work on Criminal Pleading (1 Vol. 85, Watterman's ed.) as a general rule of criminal jurisprudence, with respect to the averments of an indictment descriptive of the offense, 'that all the material facts and circumstances comprised in the definition of the offense, whether by a rule of the common law, or by statute, must be stated; if any one material fact or circumstance be omitted, the indictment will be bad.' Another standard author lays it down as a general rule, in regard to indictments, that the special manner of the whole fact ought to be set forth with such certainty, and so specifically, that it may judicially appear to the court what judgment is to be pronounced in case of a conviction; that the accused may clearly and distinctly know the charge he is called upon to answer; that the record may with certainty furnish a bar to the defendant against a second prosecution for the same offense; and that posterity may know what law is to be derived from the record. 1 Chitty, Cr. Law 227; 2 Hale 183, 184. It is an invariable rule, that an indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime; and if any one fact or circumstance, which is a material ingredient in the offense, as defined by the statute, be omitted, the indictment will be bad."

"If all the facts alleged in an indictment may be true and yet constitute no offense, the indictment is insufficient. And a verdict does nothing more than to verify the facts charged." *State v. Godfrey*, 24 Me. 232 [41 Am. Dec. 382].

Bishop, commenting on this case, says:

"To render this expression correct, it must be interpreted to mean that the indictment is inadequate when all the facts charged in it, if true, do not complete the sum of a *prima facie* crime."

Of course matters of defense need not be negated. The rule is, that where there is an exception in the enacting clause, the indictment must negative the exception. But, if there be a proviso which furnishes matter of excuse to the party it need not be negated. The rule is thus stated in *Hirn v. State*, 1 Ohio St. 15:.

"A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into, and become a part of, the description of the offense, or a qualification of the language defining or creating it."

There are no exceptions nor proviso in this statute. There is no room for the application of this principle to this case, but it is adverted

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to by reason of the insistence of counsel for the state. The relationship of the parties and the circumstances surrounding them and the things of which they were accused are matters of description, if material, and must be set forth in the indictment. There is no rule by which they become matters of defense to be pleaded by the accused. For aught appearing in the indictment, Mrs. Entsminger and Mr. Lang may have sustained such ties of relationship as made the alleged conduct, if true, entirely innocent and proper.

It therefore follows that the manner in which the accusation is set forth is insufficient to charge immoral conduct tending to degrade and disgrace. The motions to quash are sustained, and the defendants are discharged.

DIVORCE AND ALIMONY.

[Greene Common Pleas, May, 1906.]

***PHILIP E. KEENAN, BY HIS NEXT FRIEND, HERBERT A. KEENAN, v.
MATTIE I. KEENAN.**

1. EFFECT OF FOREIGN DECREE OF DIVORCE UPON CUSTODY OF CHILD.

A decree of divorce granted on a supplemental answer and cross petition of which the plaintiff had no notice, while it may serve to terminate the marriage contract, does not determine rights either as to alimony or the custody of children.

[For other cases in point, see 3 Cyc. Dig., "Divorce and Alimony," §§ 401-405.—Ed.]

2. RIGHTS OF PARENTS TO CUSTODY OF CHILD.

A petition by a divorced husband for possession of his minor child of tender years, in accordance with the terms of a Missouri decree giving him a divorce and custody of the child, will not be granted as against the mother who is in possession of the child, and who testifies that she fled from Missouri to this state on account of the aggressions of the husband, and that she had no notice of the filing of the cross petition under which the divorce was granted, and who appears to be a woman of good character and amply able to care for the child.

[For other cases in point, see 3 Cyc. Dig., "Divorce and Alimony," §§ 350-376.—Ed.]

[Syllabus approved by the court.]

John Dolan and S. T. McPherson, for plaintiff.

W. L. Miller, for defendant.

KYLE, J.

Herbert A. Keenan in this action seeks to recover the possession and custody of his minor child, Philip Edward Keenan, from the defendant, Mattie Isabel Keenan.

Herbert A. Keenan and the defendant, Mattie I. Keenan, intermarried in May, 1900, in Greene county, state of Ohio. In 1902 or

*Affirmed by the circuit court, without report.

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1903 they removed to the state of Missouri. In May, 1905, the defendant, Mattie Keenan, filed her petition in the circuit court of Jasper county, state of Missouri, against Herbert A. Keenan, asking for divorce on the grounds of extreme cruelty and asking for the custody and care of the said minor, Philip Edward Keenan.

Philip Edward Keenan is the only child of the marriage of Herbert A. Keenan and Mattie Keenan, and is now about five or six years of age. A summons was duly issued and served upon Herbert A. Keenan, notifying him of the pendency and the prayer of the petition of Mattie I. Keenan. Herbert A. Keenan at the June term of said circuit court of Jasper county, filed a general denial to the allegations of the petition. At the same term he filed an amended answer and cross petition to the petition of his wife for divorce, making a general denial, and by way of cross petition asked for divorce from the wife on the ground of cruelty and neglect. At the November term, 1905, Herbert A. Keenan filed an amended answer and cross petition, wherein he made a general denial of the allegations of the petition and set out further facts of cruelty, and asked for a divorce and the care and custody of their minor child.

From the certified record of the case it was continued until the June term, 1906, when said Herbert A. Keenan again filed a supplemental answer and cross bill to the petition of his wife wherein he denied the allegations of the petition, and averred that Mattie I. Keenan for more than one year prior to May 15, 1906, without cause, absented herself from her husband, and asked divorce and care and custody of the child. On June 25, 1906, the action of Mattie Isabel Keenan against Herbert A. Keenan came on for hearing upon the plaintiff's petition and the defendant's supplemental answer and cross bill, and Mattie I. Keenan failing to appear and plead, the court found the allegations of Herbert A. Keenan's supplemental answer and cross petition as confessed to be true by Mattie I. Keenan, and thereupon decreed Herbert A. Keenan a divorce from his wife on his supplemental answer and cross bill, and further adjudged to him the care, custody and control of Philip Edward Keenan without any interference on the part of Mattie I. Keenan.

The record does not disclose that any summons, service or notice was ever given to Mattie Keenan of the filing and pendency of the supplemental answer and cross bill of Herbert A. Keenan against her. Herbert A. Keenan comes into court and presents this record and judgment of the circuit court of Jasper county, Missouri, and asks this court for an order directing that Mattie I. Keenan turn over to him their child, Philip Edward Keenan.

From the evidence it appears that on August 5, 1905, while the suit for divorce was pending in the circuit court of Jasper county, Missouri,

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that the defendant herein took her child and came to the home of her father in this county, where she has continued to reside and maintain her child.

From the evidence it further appears that the defendant in the divorce suit served notice on the plaintiff's attorney of the filing of a copy of the supplemental answer and cross bill.

The fact that this notice was given, and is provided for in Sec. 586 Rev. Stat. of Missouri, would seem to imply that the laws of Missouri require some notice to be given. While in fact there is no evidence to show the discharge of the plaintiff's attorney and the defendant had a right to rely that the counsel of record was still counsel of plaintiff, yet this oral testimony could not be supplemented to the certified transcript of the proceedings to make it complete. The transcript fails to show that any service or notice of any kind was given, either to the plaintiff or the plaintiff's counsel, and the testimony of defendant in this action is, that she in fact received no notice of any kind.

Without reviewing all of the authorities which I have examined, cited by counsel on both sides, suffice it to say that from the face of the record it appears that the filing of the supplemental answer and cross petition in the divorce suit was without notice to the defendant herein. She was given no opportunity to make any defense. The cause of action stated in the supplemental bill arose subsequently to the filing of the petition of the plaintiff in the divorce proceedings, and any action of the court based upon such supplemental bill without notice to her would be a proceeding wherein the defendant herein did not have her day in court, and the judgment would extend no further than a proceeding *in rem*, which might have jurisdiction, which is not here determined, to annul the marriage contract, but would not have any jurisdiction to determine the rights of this defendant either as to alimony or the custody of the child.

This view of the case is giving the judgment of the court of Missouri the same faith and credit as would be given to any judgment or proceeding in this state under the same procedure. Practice in this state so far as I have been able to determine is, that service of summons or some notice must be made on a cross bill to give the court the right to enter a judgment thereon. It is my opinion that the judgment of the Missouri court should be given the same validity and effect as any judgment in this state, and no more, even if the holding of the Missouri court should be, that it acquired jurisdiction under the certified proceedings to determine the custody of the child and bind the defendant herein.

The further ground on which I base my judgment in denying the relief herein sought, is, that the question involved is the custody of the child. The interests of the child should be regarded and considered above and beyond the rights of the parents. In view of the fact that

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the court of Missouri awarded the defendant herein temporary custody of the child after the plaintiff, Mrs. Keenan, in the divorce proceedings had set forth the alleged cruelty and neglect of the defendant herein toward the child, and that the court at a subsequent term awarded the custody of the child to the father without any further hearing and without any further evidence or without any opportunity for the defendant herein to prove her ability and right to keep the child, would seem to warrant this court under the proceedings herein, to consider the interests of the child regardless of the court of Missouri. The practice followed in this state that a child of tender years, even though the mother is guilty of wrong, involving her moral character, may still be given to the custody of the mother. In this instance under her evidence she fled from the state of Missouri by reason of fear of her husband, and has not been charged with any act involving her moral character or standing in the community and should not be deprived of her child of tender years without an opportunity to be heard.

Under the evidence heard the father proposed to take the child and give it to his two sisters, the mother proposes to keep the child with her, and live with her mother. She is amply able to furnish the child with whatever may be required for its comfort and welfare. Looking to the interests of the child of the tender age of the one here involved, there is no doubt in the mind of the court that it should be left with the mother.

It is true that a line of authorities cited by the plaintiff would give the right under the judgment of the court of Missouri to the father to the custody of the child. From the statement of the counsel I would rather infer that the divorce case was tried and determined by the court upon the petition and answer and first and second answer and cross petition of the defendant before defendant herein left the jurisdiction of the state of Missouri. While that does not appear in the transcript of the proceedings, yet if it is true and the case was finally submitted, it only makes stronger the claim of the defendant herein to have notice of any further proceedings in that case, and to have any such further proceedings without any such notice, ought not to bind the defendant herein as to the custody of her child. This conclusion has been reached with some difficulty and principally upon the ground that what the court does is for the interests of the child whose possession is herein involved. So far as the evidence goes the statutes of Missouri have not been produced and the court might be justified in applying the same rule to a proceeding in the Missouri court as if it were had in this state and applying that rule the court was without authority to determine the custody of the child upon the cross petition of the defendant.

Holding these views the petition will be dismissed and the child remanded to the custody of its mother.

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INJUNCTION—NUISANCE—SLAUGHTERHOUSES.

[Allen Common Pleas, 1907.]

DAVID W. STEINER v. GUY HENNON ET AL.

ENJOINING CONSTRUCTION OF SLAUGHTERHOUSE AS NUISANCE.

A slaughterhouse, being an incident of a legitimate business, is not a nuisance *per se*; but its maintenance and operation with its attendant loud noises and offensive odors, corrupting the atmosphere to an adjoining owner, may become a *prima facie* nuisance. Hence, the construction and operation of such a plant, even if conducted in a recognized sanitary manner, within two hundred feet of the dwelling house and less than fifty feet from the stock barns of one engaged in raising fine stock, especially horses, with its prospective deleterious effects upon brood mares, will interfere with such adjoining owner's comfort and enjoyment of his property and work irreparable injury to his business, and as such is a nuisance *per se*, and will be enjoined, but as to property more than six hundred feet away no proximate injury accrues against which a restraining order will be issued.

[For other cases in point, see 5 Cyc. Dig., "Injunction," §§ 378-429; 6 Cyc. Dig., "Nuisance," §§ 31-85.—Ed.]

[Syllabus approved by the court.]

MOTION to dissolve temporary injunction.

Ridenour & Halfhill, for plaintiff.

Klinger & Secrest, for defendants.

QUAIL, J.

The plaintiff, David W. Steiner, is the owner of a tract of land situate in Perry township, this county. Said tract of land contains about 330 acres and has located thereon a dwelling house and other farm buildings. One of the defendants, Miner C. Crossley, is the owner of one acre of land adjoining plaintiff's land, the same being located a distance of about two hundred feet from the dwelling house on plaintiff's farm. The defendant, Miner C. Crossley, has leased the acre of ground owned by him to the defendants, Guy Hennon and John W. Hennon, for the term of five years, and said lessees propose to use said acre so leased for slaughterhouse purposes. Said Hennons propose to erect a building on said acre so leased and to use said building for a slaughterhouse. They also expect to construct pens in which to confine animals awaiting slaughter, and to keep upon said premises a number of hogs to consume the offal incident to the slaughtering of animals.

The plaintiff, Steiner, filed his petition in this court, alleging that said Hennons proposed to erect a slaughterhouse upon said acre of land; that said defendants will, if permitted to erect and operate said slaughterhouse, cause noxious and offensive smells and loud and offensive noises to escape therefrom which will taint and corrupt the at-

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mosphere in that vicinity and which will especially so corrupt it immediately in and around the dwelling house of plaintiff as to render the same unfit for habitation. The plaintiff also avers that the drainage of said acre tract is insufficient for slaughterhouse purposes as planned by said defendants; that said plans so adopted for erecting and conducting said proposed slaughterhouse and stock pens are unsanitary and dangerous and will, if permitted, render said premises a public nuisance, will make the dwelling of said plaintiff dangerous as a habitation, damaging the property to an irreparable extent. The plaintiff further alleges that he is using his said farm of 330 acres for the breeding of fine stock, and especially the breeding of fine horses; that the sight, smell or presence of blood and the escape of noxious and poisonous smells from said proposed slaughterhouse and premises so leased, will especially damage the farm and plaintiff's business conducted thereon to his irreparable damage and injury, for which he has no adequate remedy at law.

In a supplemental petition the plaintiff alleges that the defendant, Crossley, owner of the fee, has provided in the lease executed the defendants, Hennons, that said lessees shall at all times protect the lessor from any action in damages or other suit instituted against the defendants herein by plaintiff, growing out of the use of said property for slaughterhouse purposes, and that the defendants, Hennons, as lessees of the said premises, are not financially responsible and would not be able to respond in damage should a judgment in damages be recovered against them for interfering with plaintiff's rights and privileges by erecting and maintaining a slaughterhouse on the above-mentioned acre of ground.

The plaintiff secured a writ of temporary injunction directed against the defendants, Guy Hennon and John W. Hennon, commanding them to refrain from further erecting structures on said premises or equipping said premises for the purpose of maintaining a slaughterhouse or anything incident thereto and commanding said defendants to refrain from using the said acre of land for slaughterhouse purposes.

This cause was submitted to the court on the defendant's motion to dissolve the temporary injunction heretofore issued in the case.

The court has made a somewhat extensive examination of the numerous authorities submitted by plaintiff and defendants.

The defendants contend that a slaughterhouse is not a nuisance *per se*, and this contention is supported by the weight of authority. In and of itself the business of slaughtering animals is not only a legitimate business, but a necessity as well; but a lawful business may be established in such a location that it becomes a nuisance *per se*. While the court believes that a slaughterhouse is not a nuisance *per se*, it is also of the opinion that a slaughterhouse is *prima facie* a nuisance if carried

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on in certain locations. So, that, where a slaughterhouse was originally built remote from the dwellings and habitations of men or from public places and roads are afterwards laid out in the vicinity and dwellings subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads or the erection of the dwellings is no defense. *Seifried v. Hayes*, 81 Ky. 377, 378 [50 Am. Rep. 167].

Should a business such as described in this petition become a public nuisance, the remedy should be by indictment; so, if the plaintiff in this case is entitled to the relief sought it must be by reason of the especial irreparable injury that he would suffer by reason of the action proposed by the defendants in this case. The defendants contend that should plaintiff suffer any injury his remedy is an action to recover damages. Judge Cooley, in deciding the case of *Edwards v. Mining Co.* 38 Mich. 46, 50 [31 Am. Rep. 301], uses the following language:

"If one man creates intolerable smells near his neighbor's homestead, or by excavations threatens to undermine his house, or cuts off his access to the street by buildings or ditches, or in any way destroys the comfortable, peaceful and quiet occupation of his homestead, he injures him irrevocably. No man holds the comfort of his home for sale, and no man is willing to accept in lieu of it an award in damages. If equity could not enjoin such a nuisance the writ ought to be dispensed with altogether, and the doctrine of irreparable mischief might be dismissed as meaningless. A nuisance which affects one in his business is less in degree, but it may still be irreparable, because it may break up the business, destroy its good will and inflict damages which are incapable of measurement because the elements of reasonable certainty are not to be obtained for their computation. Even in the case of unoccupied land a nuisance may threaten an irreparable injury, where it is devoted in its purchase to some special use, or where the person causing the injury is irresponsible."

So in the case of *Cline v. Kirkbride*, 12 Circ. Dec. 517, 521 (22 R. 527), the third circuit court, Judge Day giving the decision, uses the following language:

"Under the law every person is entitled to have and enjoy his property in peace and security, and to that end an owner may prosecute and carry on upon his premises, such legitimate business as he chooses; but in doing this, regard must be had to the similar rights of an adjoining owner or proprietor, and neither can be allowed to so use his property as to greatly impair or entirely destroy the reasonable and proper use and enjoyment of the other. They must be mutually good citizens and have proper regard for the rights of each other. For little transgressions—small trespasses and slight deflections from the line of good citizenship—the law affords an adequate remedy; but for the

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larger sins of commission—for continuous trespassing and injury, for wrong acts and conduct threatened, resulting in great or irreparable injury not susceptible of being accurately measured or adequately compensated in damages—it is proper to invoke the great remedy of injunction.”

In the case of *Hong Wah, In re*, 82 Fed. Rep. 623, district court northern district of California, the second syllabus reads:

“The ownership of property, no matter where located, carries with it the right to use, and to permit the use of, such property in the prosecution of any legitimate business which is not a nuisance in itself; and the exclusion of any such lawful business from a particular locality can only be justified upon the ground that the health, safety, or comfort of the surrounding community requires such exclusion.”

In that case the business attempted was a public laundry in the city of San Mateo, California, which city had enacted an ordinance prohibiting the establishment of public laundries within the limits of a certain portion of said city, and the court held that said ordinance conflicted with Sec. 1 of the fourteenth amendment to the constitution of the United States.

In the case of *Catlin v. Valentine*, 9 Paige 575, it is held:

“To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses and which renders the enjoyment of life and property uncomfortable.”

This was an action to restrain the defendant, Valentine, from erecting a slaughterhouse at the intersection of Second avenue and Fifth street in the city of New York, and the proposed location would probably affect many persons who occupied or owned dwellings in the vicinity, while in the present case plaintiff alone may suffer special damage and irreparable injury. It is true that the courts, as a general rule, have held that even though a building proposed to be erected might be a nuisance, still a court of equity could not interfere, but would leave a party to his action on the case. *Dunning v. Aurora*, 40 Ill. 481.

So the general rule, “that where the thing complained of is not a nuisance *per se* but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is, that a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance; and so, where a building in course of erection, or about to be erected, will not of itself constitute a nuisance, equity will not enjoin it on the ground that it may be used for a purpose which will make it a nuisance. If the building is in fact used in such a manner as to create a nuisance, its use for such purpose will then be enjoined,”

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cited in the case of *Chambers v. Cramer*, 49 W. Va. 395 [38 S. E. Rep. 691; 54 L. R. A. 545, 547], and taken from 14 Enc. Pl. & Pr. 1129.

In same case, citing from the case of *Hough v. Doylestown*, 4 Brews. (Pa.) 333, it was held that in order for equity to enjoin a private nuisance "the danger must be impending and imminent, and the effect certain, not resting on hypothesis or conjecture, but established by conclusive evidence. If the injury is doubtful, eventual or contingent, or if the matter complained of is not *ipso facto* a nuisance, * * * an injunction will not be granted." So, "in cases of prospective nuisance a court of equity will not interfere unless the damage to be apprehended will be serious, nor when, upon balancing the inconveniences or injuries, greater injury will be inflicted by granting than by refusing an injunction."

The property rights of plaintiff and defendants must both be respected. This court must assume that the defendants, Hennons, intend to conduct the business proposed in a legitimate and proper manner; so that, if equity should restrain the erection of the proposed plant for slaughterhouse purposes, it must do so solely on account of the proposed location and by reason of the proximity of the said location to the plaintiff's house.

This court, of its own motion, has visited the proposed location in order that, by a view of the said premises, it might be better able to understand the evidence adduced to the court in this case. In this case the evidence shows that this acre of ground adjoins the barn lot of the plaintiff, the south line of said acre being only two hundred feet from the dwelling located on plaintiff's farm and only a few feet (probably fifty) from the barn on said premises. The evidence further shows plaintiff to be engaged in building another barn about six hundred feet east of the proposed location for a slaughterhouse; but the court does not consider this fact as of any weight in the case for the reason that the distance is too far, in the opinion of the court, for plaintiff to suffer irreparable injury by reason of this proposed slaughterhouse's being erected within six hundred feet of his proposed barn.

Therefore the sole question for the court to determine is, whether or not the said proposed slaughterhouse will be so located as to irreparably injure plaintiff by reason of its proximity to the dwelling house and barn at present upon plaintiff's premises. A slaughterhouse, not being a nuisance *per se*, unless in certain locations and surroundings, and it being the presumption of the law that a person engaged in a legitimate business will conduct the same properly, the court in this instance, in order to justify the remedy sought by the plaintiff in this case, must hold that said proposed slaughterhouse is a nuisance *per se* to plaintiff located as the evidence in this case shows the proposed erection to be.

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Defendants admit their intention of building said slaughterhouse; that they expect to slaughter here animals, consisting of calves, cattle and hogs, of the value of twenty thousand dollars yearly; that they expect to keep from fifteen to twenty-five hogs upon said premises at all times fattening upon the offal from said proposed slaughterhouse, and that they propose to cook said offal in kettles or vessels before feeding same to said hogs. Part of the surface drainage of said acre passes south towards plaintiff's dwelling house. Plaintiff's testimony is to the effect that the cooking of offal and feeding the same as defendants admit they propose to do, will be productive of noisome and offensive smells and odors; that the smells and odors so arising are dangerous to the health of the occupants of said dwelling house; that the smell of blood from the slaughter of animals, if permitted in this location, will injure plaintiff's business of breeding and raising fine stock, and especially horses; that the smell of blood is a well-known and well-recognized cause of abortions in brood mares; that a slaughterhouse operated in a recognized sanitary manner would still produce that result and irreparable injury if located in such proximity to the buildings of plaintiff as is proposed by the defendants.

Carefully considering all the evidence introduced in this case, the location of the proposed building with reference to the dwelling house and barn of the plaintiff and the kind of business the defendants propose to conduct if not enjoined, the court is of the opinion that the operation of a slaughterhouse upon the premises described in the petition would, even if conducted in a sanitary manner, interfere with the plaintiff in the comfort and enjoyment of his property and work an irreparable injury to him,—an injury for which the plaintiff would have no adequate remedy at law.

Holding these views, the court will overrule the motion of the defendants to dissolve the temporary injunction heretofore issued and allow exceptions to the defendants.

GUARDIAN AND WARD—PARENT AND CHILD.

[Wyandot Common Pleas, January Term, 1906.]

JAY A. HARE v. MARY A. SEARS, GUARDIAN.

1. APPOINTMENT OF GUARDIAN REVIEWABLE ON ERROR.

An order of the probate court appointing a stranger guardian of a minor child is a final order affecting a substantial right of its father and is reviewable on error.

[For other cases in point, see 4 Cyc. Dig., "Error," §§ 107-127; 4 Cyc. Dig., "Guardian and Ward," §§ 68-74.—Ed.]

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2. WHEN GUARDIAN SHALL BE APPOINTED.

The father is by law and nature the guardian of his minor child, and the necessity for the appointment of a guardian does not arise except for cause.

[For other cases in point, see 4 Cyc. Dig., "Guardian and Ward," §§ 60-63; 5 Cyc. Dig., "Parent and Child," §§ 1-40.—Ed.]

1. WHEN A STRANGER MAY BE APPOINTED GUARDIAN.

Where cause exists for the appointment of a guardian for a minor child, it must be shown that the father is an unsuitable person before another can be appointed.

[Syllabus by the court.]

ERROR to Wyandot probate court.

Benjamin Meck, for plaintiff in error.

T. D. Lanker and D. C. Parker, for defendant in error.

DUNCAN, J.

This case is here on error from the probate court of this county. The controversy arises over the appointment of a guardian for the person and estate of one Mary E. Hare, a minor.

The said Mary E. Hare is the daughter of plaintiff in error and his wife, Harriet E. Hare, sister of defendant in error, and at the commencement of proceedings in the court below was fourteen years of age. Her father and mother were divorced by decree of court about ten years ago, and her custody was awarded her mother with whom and her grandmother and said aunt she has ever since lived and made her home until during the fall of last year when her mother died. Ever since the death of her mother said child has lived and made her home with her grandmother and said aunt as before, who have done everything for her due a child left an orphan at such tender years.

On December 14, after the death of the mother, plaintiff in error made application to said probate court to be appointed guardian of his said child, and on the next day defendant in error also made application to said court to be appointed such guardian. At the same time said child also asked said court that her said aunt be so appointed.

Upon hearing, the court denied the application of plaintiff in error, and granted the application of defendant in error, and appointed her such guardian, and she thereupon gave bond and qualified accordingly. It is to reverse said order of appointment that this proceeding in error is prosecuted.

It is claimed by counsel for defendant in error that because the probate court, under Rev. Stat. 524 and 6254 (Lan. 803 and 9795), has not only original but exclusive jurisdiction in the appointment of guardians for minors, the proceedings of the probate court in that be-

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half are not subject to review. This is good argument as against the "appeal" of a case where the statute does not provide specifically for the appeal. Otherwise, the jurisdiction would not be exclusive. But review on error is not exercising jurisdiction on appointment. Revised Statute 6708 (Lan. 10298) provides that any "judgment rendered or final order made by a probate court * * * may be reversed, vacated, or modified by the court of common pleas." There was an order made, and made by the probate court, and made dismissing the application of plaintiff in error and appointing the defendant in error guardian of the person and estate of the minor child of plaintiff in error. A final order is defined by Rev. Stat. 6707 (Lan. 10297), as "an order affecting a substantial right made in a special proceeding." A substantial right is such right as may be enforced and protected by law. *Armstrong v. Brewing Co.* 53 Ohio St. 467 [42 N. E. Rep. 425]. And as a final order respecting the custody of children in a divorce suit may be reviewed on error without special statute (*Neil v. Neil*, 38 Ohio St. 558), it follows that an order affecting the final disposition of children in the appointment of a guardian of their person and estate, is also a final order affecting a substantial right of the person otherwise entitled to their control. It is a special proceeding because it seeks a remedy not by action but by original application for order of court. *Missionary Society v. Ely*, 56 Ohio St. 405 [47 N. E. Rep. 537]. I hold, therefore, that this court has jurisdiction of this proceeding.

There are but three errors complained of as intervening in the probate court:

First. That there was no finding that the father was an unsuitable person for such appointment.

Second. That the findings are not supported by the evidence and are against the weight of the evidence.

Third. That the court erred in the admission and rejection of evidence.

The view which I take of the first makes it unnecessary for me to discuss the other two.

It may be conceded that the father is not only by nature but by law the guardian of the person of his minor child, and by virtue thereof entitled to its custody. The fact that the custody of said child by decree of the divorce court was taken away from the father and given to the mother, no longer controls, as the mother has since deceased and that order has thereby become nugatory. *Coons, In re*, 11 Circ. Dec. 208 (20 R. 47).

The father, both by law and by nature, being the guardian of his minor child and entitled to its custody, the necessity for the ap-

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pointment of a guardian does not arise except for cause. The power of appointment is conferred upon the probate court to be exercised only when necessary. Revised Statute 6254 (Lan. 9795); Rockel, Probate Practice Sec. 1312.

Revised Statute 6255 (Lan. 9796), sets forth the conditions under which the necessity may be said to arise, viz.:

1. That the minor has an estate. And in such case the appointment is limited to the estate only, except where one or more of the other three conditions exist.
2. The death of both parents.
3. The parents becoming unsuitable, or
4. The liability of the parents' interests, in the opinion of the court, being promoted by the appointment.

While Rev. Stat. 6257 (Lan. 9798), provides that any "female infant over the age of twelve years, shall have the right to select a guardian, who, if a suitable person, shall be appointed," this right does not arise where the necessity for the appointment of a guardian does not exist. Rockel, Probate Practice Secs. 1329-1330. The necessity is a condition precedent and the right to select, a mere incident. Otherwise the power of the probate court could be invoked for the appointment of a guardian for herself by the mere whim of any female over twelve years of age, regardless of any necessity or any good reason therefor. The right only becomes absolute when the conditions arise for its exercise. If this construction is not correct, the statute is imperative upon the probate court, the only limitation being that the person selected is a suitable person to undertake the trust. This, certainly, is not the meaning of the statute and its absurdity will appeal to anyone when the principle is applied to most any given case where the parent has not become unsuitable.

Take your own case, or take my case: Granted that I am a suitable person to have the custody and tuition of my daughter, now coming to the age of fourteen years, can it be said that she can invoke the jurisdiction of the probate court of my county and by her selection have my neighbor appointed her guardian just because she wants him, and he is a suitable person to act? I think not. But suppose I am not a suitable person, nor my wife, then upon such finding the court may appoint such guardian and shall appoint the choice of the daughter, if that choice is suitable. Here is the dividing line. It defines the limitations of the court's jurisdiction, where, as in this case, it is sought to have the custody and tuition of the child go with the appointment. This is made quite clear by Rev. Stat. 6264 (Lan. 9805), which provides that even where a guardian has been appointed for both the person and estate of the minor, "the father of such minor,

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or if there be no father, the mother, if suitable person, respectively, shall have the custody of the person and the control of the education of such minor."

Reading all these sections of the statute together in an endeavor to give force and effect to every provision in the various situations arising in their administration, and to make the same one harmonious whole, I am unable to come to any other conclusion than the one which I have here announced. I have read the very able opinion of Judge Brown of the probate court and I agree with him in the considerations moving the appointment of defendant in error, and would affirm his order in so doing had he found the jurisdictional fact allowing him to make an appointment of a guardian of the person of said minor.

I agree with the contention made that it is the best interests of the child that prompts the court to act, and in acting, that all other considerations must yield, but in the absence of a finding to the contrary, which I have already explained, the law presumes that the child of his own flesh and blood, born subject to his custody and control, will be more apt to receive that kindly care and protection from the father during its tender years than any stranger would be expected to bestow; and unless it otherwise appears, it must also be presumed that the plaintiff in error possesses that same love and affection and will bestow upon his child such care and protection as would naturally and ordinarily be expected from any father to his daughter under the same or similar circumstances and conditions, aside from any ill-will which may exist between the father and the mother's people. This may be said to be the general law of the land. *Weir v. Marley*, 99 Mo. 484 [12 S. W. Rep. 798; 6 L. R. A. 672]; *Clark v. Bayer*, 32 Ohio St. 299 [30 Am. Rep. 593].

And accordingly it has been provided by our statutes that this presumption must be overcome by proof that the father is unsuitable. This, I say, is the jurisdictional fact wanting in this record by reason of which I hold the appointment made to be void. Partly as authority, but more as tending to show the trend of judicial interpretation of these statutes, I cite: *Boescher v. Boescher*, 5 Dec. 184 (7 N. P. 418); *State v. Madden*, 12 Dec. 83.

Holding the views which I have expressed, it follows that said order of the probate court must be reversed and the cause remanded to that court with instructions to inquire into the suitability of plaintiff in error for the appointment which he seeks, and to make a finding in respect thereto before appointing a guardian for said minor. It is further ordered that defendant in error pay the costs of this proceeding.

Barnard v. Anselm.

ATTACHMENT—JUSTICE OF THE PEACE.

[Lorain Common Pleas, April 10, 1907.]

H. A. BARNARD v. FRANK A. ANSELM.

JURISDICTION OF COMMON PLEAS COURT OVER NONRESIDENT.

Where an action on a promissory note asking judgment for more than \$100 is begun before a justice of the peace in a county where the defendant has real estate, he not being a resident of that county, but a resident of another county in Ohio, and an attachment is issued on the ground that the defendant is a nonresident of the county, and the case is thereafter certified to the common pleas court under Rev. Stat. 6514 (Lan. 10091), the fact that the defendant is a nonresident of the county is not a ground of attachment in such case in the common pleas court. In such a case the defendant must be sued in the county where he resides or may be summoned, and the common pleas court cannot acquire jurisdiction over the person or the real property of the defendant within the county, by attachment proceedings.

[For other cases in point, see 3 Cyc. Dig., "Courts," §§ 976-987; 7 Cyc. Dig., "Venue," §§ 113-124.—Ed.]

[Syllabus by the court.]

MOTION to jurisdiction of court.

G. H. Chamberlain, for plaintiff.

D. J. Nye, for defendant.

WASHBURN, J.

As shown by the papers in the case, the above plaintiff brought an action against the defendant on March 2, 1907, before a justice of the peace of this county, claiming that the defendant owed him \$279.80 upon a certain promissory note.

The defendant being a nonresident of this county, but a resident of Cuyahoga county, the plaintiff filed an affidavit for attachment before the justice of the peace, in which the only ground for attachment stated was, that the defendant was a nonresident of Lorain county.

The justice issued the summons and order of attachment, which was returned by the constable, with the indorsement that the defendant was not found in the county, and that the defendant had no goods nor chattels in the county upon which to levy; but that he had an interest in certain real estate in the county.

Thereupon the justice certified the case to this court, and the transcript of his proceedings was filed in this court on March 6, 1907.

On March 7, 1907, when nothing had been filed in this court except such transcript, the plaintiff filed a praecipe and caused an order of attachment to issue, by virtue of which the sheriff attached the real estate of the defendant in this county.

On March 15, 1907, the original papers in the case before the justice of the peace were filed in this court, and on the same day the plain-

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tiff filed his petition against the defendant in which he seeks to recover said sum of \$279.80 upon said promissory note.

No affidavit for attachment was filed in this court, except the affidavit which was filed before the justice of the peace, and that was not filed in this court until after an attachment was issued and returned in this court.

On March 15, 1907, the plaintiff caused a summons to issue from this court to the sheriff of Cuyahoga county, which was duly served upon the defendant in that county.

On March 29, 1907, the defendant filed the following motion:

"Now comes the defendant, Frank A. Anselm, not intending to in any manner enter his appearance herein, but for the sole purpose of protesting and objecting to the jurisdiction of this court over this defendant. He therefore moves the court to quash the summons issued herein and to dismiss the action against this defendant for want of jurisdiction of his person."

The case has been submitted to the court upon said motion.

The plaintiff seeks to maintain this action under the provisions of Rev. Stat. 6514 (Lan. 10091), notwithstanding the fact that had the action been brought in this court originally, no attachment could have been issued upon the ground that the defendant was a nonresident of the county.

Said section after providing that in a case where an order of attachment has been issued by a justice of the peace, and it appears by the return of the officer, that the defendant has no personal property in the county, but is the owner of real estate situated in the county, the justice is required to certify his proceedings to the court of common pleas, "and the action shall be proceeded with in all respects as if the same had originated therein, except that in all actions under this section, for any sum of which justices of the peace have exclusive original jurisdiction, if the defendant be a nonresident of the county, such nonresidence shall be a ground of attachment in the court of common pleas."

It seems quite clear to me that the legislature did not intend by this section, to make nonresidence of the county a ground of attachment in the common pleas court, except in cases which come within the exclusive original jurisdiction of the justice of the peace, and which are certified to the common pleas court under Rev. Stat. 6514 (Lan. 10091). This not being such a case, the issuing of the order of attachment on the ground stated in the affidavit in this case, was clearly unauthorized.

Then again, said statute provides that when the case has been certified to the common pleas court, it shall be proceeded with in all respects as if the same had originated in the common pleas court. If

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it had originated in the common pleas court, it would have been necessary to have filed an affidavit in attachment; and no affidavit having been filed in the common pleas court, the attachment was a nullity for that reason.

The plaintiff, however, claims that even if the attachment was not proper, still the case should not be dismissed, and asks the court for permission to file an affidavit in attachment, setting forth other grounds than that of nonresidence of the county.

That request will have to be denied, for the reason that no jurisdiction over the person or real property of the defendant can be acquired by attachment proceedings in this court, on the cause of action stated in the petition.

Under the statutes of Ohio, certain actions must be brought in the county where the subject of the action is situated.

This section refers to the recovery or partition of real estate, or the sale of the same "under a mortgage, lien or other encumbrance or charge." Rev. Stat. 5019 (Lan. 8534).

Then it is provided that certain actions must be brought in the county where the cause of action or some part thereof arose. Rev. Stat. 5022 (Lan. 8537). But an action on a promissory note is not included in those enumerated in this section.

An action other than those thus provided for, against a nonresident of the state, may be brought in any county where such nonresident is found or has property. Rev. Stat. 5027 (Lan. 8542).

"Every other action must be brought in the county in which the defendant resides or may be summoned, except actions against an executor," etc. Rev. Stat. 5028 (Lan. 8543).

When the action is rightly brought in any county, according to the foregoing provisions, a summons may be issued to any other county against one or more of the defendants. Rev. Stat. 5035 (Lan. 8550).

The summons in this case which was issued to, and served by, the sheriff of Cuyahoga county, was of no effect for the reason that the action was not rightly brought in this county under the sections of the statutes referred to in Rev. Stat. 5035 (Lan. 8550).

The defendant being a resident of Ohio and not a resident of Lorain county, no jurisdiction of his person or of his real estate in this county can be acquired by an attachment issued from the common pleas court of this county, upon the cause of action set forth in the petition in this case.

The statute plainly provides that he must be sued in such an action in the county where he resides or may be summoned.

While I find no reported case which directly decides the question under consideration, my attention has been called to a case which was not reported, decided by our circuit court some years ago, in which

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this was the only question involved and decided. That is case No. 363 of the circuit court of Lorain county.

That was a case brought in the common pleas court of this county upon a promissory note, against a defendant who owned real estate in this county, but who lived in Stark county. An affidavit of attachment was filed, which set forth that the defendant was about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors, and that the defendant was about to dispose of his property or a part thereof with intent to defraud his creditors.

A writ of attachment was issued and levied upon the real estate of the defendant in this county, and a summons was issued to the sheriff of Stark county and served upon the defendant in that county.

The defendant filed a motion very similar to the one in the case at bar, in which he asked the court to dismiss the action, for the reason that the court had no jurisdiction of his person, and because he was a resident of another county in Ohio.

The common pleas court overruled said motion, and thereafter rendered a default judgment against the defendant, and ordered his real estate sold to satisfy the judgment.

The defendant prosecuted error, and the circuit court reversed the case upon the sole ground that,

"The court of common pleas erred in overruling the motion of plaintiff in error to dismiss the said action against him."

That case is directly in point, and being by our circuit court, is binding upon this court.

The motion of the defendant in this case is therefore granted, and the case is dismissed at the costs of the plaintiff.

It has been suggested that the defendant has entered his appearance to this action by filing his motion asking the court to dismiss the action, but that suggestion was also made in the circuit court case, I have referred to, where the motion was very much like the motion in this case, and was filed under somewhat similar circumstances.

The court was not asked to pass upon the sufficiency of the petition, as was done in the case reported in *Handy v. Insurance Co.* 37 Ohio St. 366, nor was the court asked to dismiss the case on the ground that the court had no jurisdiction over the subject-matter of the action, as was done in the case reported in *Elliott v. Lawhead*, 43 Ohio St. 171 [1 N. E. Rep. 577]; but the motion filed by the defendant in this case was filed for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant, and the filing of such a motion does not constitute an entry of appearance. *Cook v. Courtright*, 39 Ohio St. 249 [48 Am. Rep. 681].

Harris v. Harris.

ATTORNEY'S FEES—TRUST PROPERTY.

[Superior Court of Cincinnati, December, 1906.]

GEORGE HARRIS v. FANNIE HARRIS ET AL.

ATTORNEY'S FEE TAXED AS COST WHEN ACTION FOR BENEFIT OF OTHERS AS WELL AS PARTY OF RECORD.

Where one litigant bears the burden and expenses of litigation for the benefit of others as well as himself, those who share the benefits should contribute to the expense. Hence, where one beneficiary to a trust fund recovers trust property for the benefit of all, a reasonable attorney's fee will be allowed as costs.

[For other cases in point, see 1 Cyc. Dig., "Attorney and Client," §§ 360-400; 3 Cyc. Dig., "Costs and Fees," §§ 290-366.—Ed.]

[Syllabus approved by the court.]

MOTION for allowance of attorney fees.

Jacob Shroder, for motion.

Burch & Johnson, contra.

HOFFHEIMER, J.

The only question before me is as to whether this is a proper proceeding for the allowance of the fees claimed. The taxing of attorney fees is of course exceptional and is limited to certain classes of cases. It is contended that this case is not within the rule, and reliance is chiefly had on *Hopple v. Hopple*, 14 Dec. 285. That case, however, instead of being an authority against the allowance of fees in the particular case before me plainly shows the reasons why the fee claimed in this case should be allowed. In the *Hopple* case there was an attempt to work what would have been a wrong to the son. It failed, and accordingly the unsuccessful complainant was denied the right to tax a fee because no principle of equity or justice would warrant the taxing of a fee in such a case. In the instant case the effort was made by plaintiff to wrest the property from wrongful control (defendant, Fannie Harris, claimed the property absolutely, to the exclusion of plaintiff and others), and to restore it to the trust and to bring it into court for the benefit of all. The effort culminated in success. Under such circumstances justice and equity would require the taxing of a reasonable fee as against the fund. This is the theory of the cases followed by the court.

The principle is clearly stated in *Adams v. Milling Co.* 38 Fed. Rep. 281, wherein the court said:

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“It is well settled that when, under a bill filed by one beneficiary in a trust, in behalf of himself and all other beneficiaries, a fund is recovered and brought into court for distribution, the court may tax a reasonable solicitor’s fee as costs, and order it to be paid out of the fund so recovered.” *Internal Improvement Fund (Tr.) v. Greenough*, 105 U. S. 527 [26 L. Ed. 1157]; *Central Railroad & Bank Co. v. Pettus*, 113 U. S. 116 [5 Sup. Ct. Rep. 387; 28 L. Ed. 915].

This rule rests upon the ground that where one litigant has borne the burden and expense of a litigation that has inured to the benefit of others as well as himself, those who have shared in the benefit should contribute to the expense. In that class of cases it is customary to tax against the fund realized a fee in favor of the complainant’s solicitor before any distribution is ordered. See also, *Woodruff v. Railway*, 129 N. Y. 27 [29 N. E. Rep. 251]; *Maney v. Casserly*, 134 Mich. 252 [96 N. W. Rep. 478].

Guided by these authorities, since there is no complaint that the amount claimed is unreasonable, the motion will be allowed.

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CONTRACTS—MONOPOLIES—RESTRAINT OF TRADE.

[Superior Court of Cincinnati, General Term, January, 1907.]

Hosea, Hoffheimer and Caldwell, JJ.

(Judge Caldwell of the Hamilton common pleas, sitting in place of Judge Ferris.)

STANDARD DISTILLING & DISTRIB. CO. V. BLOCK & SONS.

1. DEFENSES MUST BE PLEADED TO BE AVAILABLE.

Plaintiff having filed a petition for the recovery of money for the breach of a contract, the defendant's proof is confined to the issues as presented by his pleading, and having failed to plead his equities he cannot afterwards set up the invalidity of the contract on the theory that it was a part of another contract not pleaded. Hoffheimer, J., dissents.

2. CONTRACTS OPERATIVE CHIEFLY IN OHIO GOVERNED BY LAWS OF THAT STATE.

A contract executed and entered into in Ohio, and whose chief stipulations are to be performed in this state, except insofar as incidentally concern certain property of one of the parties that is situated in Kentucky, is to be governed by the laws of Ohio.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 1933-1939.—Ed.]

3. CONTRACTS IN RESTRAINT OF TRADE MUST TEND TO CREATE A MONOPOLY.

Since the criterion of the validity in contracts involving the suggestion of restraint of trade is their tendency to create a monopoly, a contract whereby a distillery appoints a dealer in liquor their exclusive agent and agrees to pay such agent \$1,000 per month, in consideration of which the agent agrees to manufacture no spirits or alcohol except such as may be required in the making of whiskey at their distillery, and further, a certain rebate to be paid such agents on all goods purchased from the principal, is not invalid as being in restraint of trade, there being nothing therein tending to create a monopoly. Hoffheimer, J., dissents.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 651-685.—Ed.]

[Syllabus approved by the court.]

ERROR to special term.

Worthington & Strong and Moran, Mayer & Meyer, for plaintiff in error.

T. M. Hinkle, for defendant in error:

Error in admitting evidence. *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *Thayer v. Luce*, 22 Ohio St. 62; *Black v. Hill*, 32 Ohio St. 313; *Kilbourn v. Fury*, 26 Ohio St. 153; *Cooke v. Slate Co.* 36 Ohio St. 135 [38 Am. Rep. 568]; *Bowers' Cal. Dredg. Co. v. Bridge Co.* 132 Cal. 342 [64 Pac. Rep. 475].

The rebates. *Greene, In re*, 7 O. F. D. 245 [52 Fed. Rep. 104]; *Olmstead v. Distilling & Cattle-Feeding Co.* 77 Fed. Rep. 265; *National Distilling Co. v. Importing Co.* 86 Wis. 352 [56 N. W. Rep. 864; 39 Am. St. Rep. 902]; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. (20 Wall.) 64 [22 L. Ed. 315]; *Fowle v. Park*, 6 O. F. D. 350 [131 U. S. 88; 9 Sup. Ct. Rep. 658; 33 L. Ed. 67]; *Chicago, St. L. & N. O. Ry. v. Car*

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Co. 139 U. S. 79 [11 Sup. Ct. Rep. 490; 35 L. Ed. 97]; *Dennehy v. McNulta*, 86 Fed. Rep. 825 [30 C. C. A. 422; 59 U. S. App. 264; 41 L. R. A. 609].

Severability. *Park v. Druggists' Assn.* 175 N. Y. 1 [67 N. E. Rep. 136; 62 L. R. A. 632; 96 Am. St. Rep. 578].

Illegal purpose must be mutual. *Carter-Crume Co. v. Peurrung*, 12 O. F. D. 82 [86 Fed. Rep. 439; 30 C. C. A. 174; 58 U. S. App. 388]; *Rountree v. Smith*, 108 U. S. 269 [2 Sup. Ct. Rep. 630; 27 L. Ed. 722]; *Irwin v. Williar*, 110 U. S. 499 [4 Sup. Ct. Rep. 160; 28 L. Ed. 225]; *Bibb v. Allen*, 149 U. S. 481 [13 Sup. Ct. Rep. 950; 37 L. Ed. 819]; *United States Consol. Seeded Raisin Co. v. Griffin*, 126 Fed. Rep. 364 [61 C. C. A. 334].

Severable provisions. *Sims v. Brewing Co.* 132 Ala. 311 [31 So. Rep. 35]; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234 [91 N. W. Rep. 1081]; *McPherson v. Foster*, 43 Iowa 48 [22 Am. Rep. 215]; *Hitchcock v. Galveston*, 96 U. S. 341 [24 L. Ed. 659]; *Chicago, St. L. & N. O. Ry. v. Car Co.* 139 U. S. 79 [11 Sup. Ct. Rep. 490; 35 L. Ed. 97]; *Connolly v. Pipe Co.* 184 U. S. 540 [22 Sup. Ct. Rep. 431; 46 L. Ed. 679]; *McCausland Bros. v. Akers*, 24 O. C. C. 711; 15 Am. & Eng. Enc. Law (2 ed.) 990; *State v. Board of Education*, 35 Ohio St. 519; *Armstrong v. Bank*, 6 O. F. D. 509 [133 U. S. 433; 10 Sup. Ct. Rep. 450; 33 L. Ed. 747]; *Armstrong v. Toler*, 24 U. S. (11 Wheat.) 258 [6 L. Ed. 468]; *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466 [77 Pac. Rep. 803]; *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 220 [17 L. Ed. 530]; *King v. King*, 63 Ohio St. 363 [59 N. E. Rep. 111; 52 L. R. A. 157; 81 Am. St. Rep. 635]; *Widoe v. Webb*, 20 Ohio St. 431 [5 Am. Rep. 664]; *Doty v. Bank*, 16 Ohio St. 133; *Hoffman v. McMullen*, 83 Fed. Rep. 372 [28 C. C. A. 178; 48 U. S. App. 596; 45 L. R. A. 410]; *Jackson v. Dwight*, 78 Fed. Rep. 896 [24 C. C. A. 380; 41 U. S. App. 614]; *Metcalf v. American School Furniture Co.* 122 Fed. Rep. 115; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507 [43 Atl. Rep. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612]; *Diamond Match Co. v. Roeber*, 106 N. Y. 473 [13 N. E. Rep. 419; 60 Am. Rep. 464]; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 [20 Sup. Ct. Rep. 96; 44 L. Ed. 136]; *Lange v. Werk*, 2 Ohio St. 519; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596 [49 N. E. Rep. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736]; *Thomas v. Miles*, 3 Ohio St. 274; *Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617 [11 Sup. Ct. Rep. 412; 34 L. Ed. 1083]; *Davis v. Booth & Co.* 131 Fed. Rep. 31, 37.

Restraint is not always against public policy. *Harrison v. Lockhart*, 25 Ind. 112; *McAlister v. Howell*, 42 Ind. 15; 2 Parsons, Contracts 529; Chitty, Contracts (10 Am. Ed.) 807; *Oscanyan v. Arms Co.* 103 U. S. 261 [26 L. Ed. 539]; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Hines v. Bank & Tr. Co.* 120 Ga. 711 [48 S. E. Rep. 120].

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The public is not concerned. *Chicago, St. L. & N. O. Ry. v. Car Co.* 139 U. S. 79 [11 Sup. Ct. Rep. 490; 35 L. Ed. 97]; *Clark v. Needham*, 125 Mich. 84 [83 N. W. Rep. 1027; 51 L. R. A. 785; 84 Am. St. Rep. 559]; *Fox Solid Pressed Steel Co. v. Schoen*, 77 Fed. Rep. 29; *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617 [11 Sup. Ct. Rep. 412; 34 L. Ed. 1083]; *Fowle v. Park*, 6 O. F. D. 350 [131 U. S. 88; 9 Sup. Ct. Rep. 658; 33 L. Ed. 67]; *Gibbs v. Gas Co.* 130 U. S. 396 [9 Sup. Ct. Rep. 553; 32 L. Ed. 979]; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. (20 Wall.) 64 [22 L. Ed. 315]; *Gibbs v. McNeeley*, 118 Fed. Rep. 120 [55 C. C. A. 70; 60 L. R. A. 152]; *United States v. Knight Co.* 156 U. S. 1 [15 Sup. Ct. Rep. 249; 39 L. Ed. 325]; *State v. Gaslight Co.* 92 Minn. 467 [100 N. W. Rep. 216].

Agency. *Oliver v. Gilmore*, 52 Fed. Rep. 562.

The law applicable. *Polson v. Stewart*, 167 Mass. 211 [45 N. E. Rep. 737; 36 L. R. A. 771; 57 Am. St. Rep. 452]; *Minor, Conflict of Laws* 420, 421; *London Assur. Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 149 [17 Sup. Ct. Rep. 785]; *Kulp v. Fleming*, 65 Ohio St. 321 [62 N. E. Rep. 334; 87 Am. St. Rep. 611].

Valentine act and Ohio common law. *State v. Pipe Line Co.* 61 Ohio St. 520 [56 N. E. Rep. 464]; *Gage v. State*, 24 O. C. C. 724.

Ethics. *Armstrong v. Bank*, 6 O. F. D. 509 [133 U. S. 433; 10 Sup. Ct. Rep. 450; 33 L. Ed. 747].

HOSEA, J.

Block & Sons (herein referred to by initials), plaintiffs below, recovered judgment by consideration of the court at special term against the Standard Distilling Company (herein referred to by initials), defendant below, upon a written contract dated September 14, 1898, in substance as follows:

“(1) The S. D. Co. to appoint B. & Co. their ‘authorized dealers.’

“(2) B. & Sons agree to purchase and pay for continuously and exclusively of the S. D. Co. their ‘entire need and supply of spirits and alcohol.’

“(3) B. & Co. agree that they will not manufacture spirits and alcohol except such as they may require in making whiskey at their distillery, which whiskey shall be marked as ‘whiskey’ and not as ‘spirits’ and shall not be tax paid less than six months old.

“(4) The S. D. Co. agree to pay to B. & Sons upon compliance with the conditions of this contract, and those of exhibit A, attached hereto, \$1,000 per month.

“(5) The contract to continue five years from date.

“(6) Nothing herein to be construed as preventing B. & Sons from manufacturing bourbon, rye or continuous whiskeys or gins.

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“(7) This agreement to be binding upon the parties, their successors or assigns, and upon any purchaser or transferee of any distillery of B. & Sons, excepting the Pennwick distillery in Pennsylvania.

“(8) If the contract is not renewed at the end of five years, any rebates then due B. & Sons under exhibit A shall be paid over.”

Exhibit A attached to said contract provided in substance as follows:

1. The S. D. Company appoints B. & Sons one of their “authorized distributors.”

2. S. D. Co. agrees for the purpose of securing the continuous and exclusive patronage of B. & Sons to allow a rebate of one cent per proof gallon on all spirits, alcohol, double stamped gins, and continuous goods purchased of the S. D. Co. on proof furnished.

3. The S. D. Co. further agree to pay into the treasury of the United States Spirits Association one-half cent per proof gallon on such purchases.

4. S. D. Co. authorize B. & Sons to use the trade-mark of the S. D. Co. on invoices of goods so purchased.

5. S. D. Co. agrees not to increase rebates or offer any rebates to customers of B. & Sons; and to sell to B. & Sons at same terms as it makes with any of its other “authorized dealers” during the five years.

6. (Reiterates clause 8 of the main contract.)

The amended petition below, filed October 30, 1900, setting up this contract avers that B. & Sons complied with all the conditions on their part to be performed, but that the S. D. Co. failed to pay the installments due from July to December inclusive, of 1899, and January to April, inclusive, of 1900—in all \$10,000, for which B. & Sons ask judgment with interest from April 30, 1900.

To this petition a general demurrer was filed on November 16, 1900, and overruled on February 20, 1901; and as appears from a memorandum opinion of the court below, the argument in support of the demurrer was based on the claim that the contract in question was void, as being in restraint of trade.

On March 11, 1901, the defendant below answered, setting up as its defenses:

(1) A general denial except as to specific admissions relating to the status of parties;

(2) That said contract was in violation of the statute law of Kentucky and void;

(3) That said contract was in violation of the common law of Kentucky and void.

The reply filed by plaintiff below denied the new matter of the answer and joined issue as upon its petition. The judgment of the

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court below rendered upon a full hearing was in favor of B. & Sons, and this proceeding in error is prosecuted to reverse said judgment.

Both in testimony and argument the defense below was carried quite beyond the issue presented by the pleadings and should have been restrained within those limits. The action was for recovery of money alleged to be due upon a contract; and, while the defendant was fully authorized by the code of civil procedure to interpose legal and equitable defenses by answer, its failure to do so was a waiver as to such as might have been pleaded. *Stewart v. Hoag*, 12 Ohio St. 623; *Witte v. Lockwood*, 39 Ohio St. 141; *Hites v. Irvine*, 13 Ohio St. 283.

This being so, the assumption of the invalidity of the contract sued upon, under the theory that it was a mere incident and part of another contract not pleaded, is not tenable and must be discarded here. This case must stand or fall upon the contract pleaded and the issues raised thereon, viz., the written agreement of September 14, 1898, (including its attached exhibit A) and its alleged breach.

But this contract was made in Ohio, and its main stipulations—to wit, the sale and purchase of spirits and alcohol, and corresponding payments and concessions—were to be performed in Ohio; and notwithstanding the reference to the Kentucky distillery (which, as will be shown later, was incidental merely), the issues are to be dealt with under Ohio law and not under the laws of Kentucky.

Strictly speaking, these holdings might be said to dispose of the case, under the issues presented; but as the case was argued upon general doctrines of the common law of Ohio as affecting the pleaded contract, we have considered the case in this aspect.

It is claimed by the plaintiff in error here that the contract is invalid as being in restraint of trade because, it is urged, its main purpose is to restrict and prevent manufacture by plaintiff, and that the real consideration for the agreement to pay \$1,000 per month is a restriction which was unreasonable because unlimited in extent. In a word it is claimed that this was an agreement to purchase the defendants in error "out of business," as phrased in *Luffkin Rule Co. v. Fringeli*, 57 Ohio St. 596 [49 N. E. Rep. 1030; 41 L. A. R. 185; 63 Am. St. Rep. 736]. Then follow other suggested objections, couched in terms of inductive reasoning,—among them, that the contract tended to enable the plaintiff in error to charge a higher price for goods sold by increasing its power to control the market, etc.; and, further, that it does not empower the defendant in error to fix the prices of goods purchased from plaintiffs in error under it.

Manifestly these arguments depend for their cogency upon the construction to be given to the contract itself; and this is obviously a condition precedent to consideration of the legal results flowing from it.

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Certain facts surrounding the making of the contract are to be taken into consideration. Block & Sons were dealers in alcohol, spirits, whiskey, etc., and were located and doing business in Cincinnati. They also owned and operated a distillery in Kentucky, and one in Pennsylvania—but the latter being excepted in the contract, cuts no figure here.

The Kentucky distillery was a source of supply in their business as dealers in spirits and alcohol, but to what extent is not shown. Spirits and alcohol are the primary product of the distillation of grains, and may be regarded as the raw material for the manufacture of whiskey, etc.

In construing contracts to ascertain the intention of parties, it is an elemental principle that the parties are to be presumed to intend lawful as opposed to unlawful obligations; and out of this has grown the established rule that where a contract is susceptible of two constructions one of which makes it lawful and the other unlawful, the former is to be adopted. 1 Page, Contracts 1120; *Hobbs v. McLean*, 117 U. S. 567 [6 Sup. Ct. Rep. 870; 29 L. Ed. 940].

Extending the same principle to contracts involving restriction of trade, it is held that they are to be taken, where possible, to impose reasonable as opposed to unreasonable limitations as to time and space. *Dethless v. Tamsen*, 7 Daly 354. And this is carried to the extent of arbitrarily discarding what is unreasonable where the context permits a separation as between it and that which is reasonable. *Lange v. Werk*, 2 Ohio St. 519. In this connection also the principle of *fortius causa preferentem*, is applied as between the parties in various relations. *London Assur. Co. v. Companhia, de Moagens*, 167 U. S. 149 [17 Sup. Ct. Rep. 785; 42 L. Ed. 113]; *Texas & Pac. Ry. v. Reiss*, 183 U. S. 621 [22 Sup. Ct. Rep. 253; 46 L. Ed. 358]; *Laidlaw v. Marye*, 133 Cal. 170 [65 Pac. Rep. 391].

Considering the contract in question in the light of these principles, it seems plain that the primary object of the contract had relation to the business of Block & Sons as dealers and not as manufacturers; also, that the parties were contracting with reference to the conditions surrounding the business of Block & Sons as it then existed. In other words the parties dealt with an existing status and did not reach out to cover all possibilities of the future, because there was nothing in existing conditions to suggest it. The obligations imposed on Block & Sons were specifically limited in time, and were determinable practically at their will, subject only to a possible liability in damages necessarily limited in amount.

Having reference to the supply of spirits and alcohol for resale in their ordinary trade as dealers, the provision as to manufacture in Kentucky was an incident implied in the stipulation for furnishing

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the "entire need and supply," and not necessarily a restriction at all; for it could mean nothing else than that Block & Sons should not sell the product of the distillery as spirits or alcohol—that is, as raw material—in diminution of the quantity stipulated for. In a word, it is quite supposable within the terms of the contract, that so far from restricting the output of the Kentucky distillery, the arrangement may have tended to increase the same by enabling Block & Sons to convert the entire product into whiskey to meet a possibly increased demand. The view we take of the contract on this point necessarily confines its operation as to territorial scope to the Kentucky distillery, and this we think fully justified by the precise language used, when construed in harmony with the general rules of construction before stated, and in view of the limitations arising out of the main purpose of the contract and the conditions surrounding its execution. This applies also to the phrase, "any distillery property belonging to the second party," because the term "belonging" applies strictly to an existing and not a future ownership.

To illustrate the legal status more concretely, let us suppose (1) that Block & Sons had reached a determination to devote their distillery product entirely to the production of whiskey in view of or anticipating an increased demand in this direction; and, to maintain their independent trade as dealers in spirits and alcohol, should have contracted with other manufacturers for their own "entire need and supply" of those goods. Certainly no one would claim such a contract to be objectionable in law. But suppose again (2) that a single outside manufacturer, learning of the determination of Block & Sons, should propose to them that if they would bind themselves for a limited period to adhere to their determination to devote their distillery to producing whiskey only and contract with the proposer for their entire supply of spirits and alcohol for resale, that a certain bonus and certain rebates—in other words, certain reductions in prices—would be given, which would be advantageous to Block & Sons. Upon what ground could such a contract be assailed for illegality? In this connection, we think that an agreement to sell at "lowest price given any customer" must be given a practical construction and not a strained theoretical one. There were other manufacturers, and a market which must necessarily govern prices in a general way. The phrase used is, therefore, practically synonymous with "lowest market price," in the sense used by the parties; for it must be taken for granted that to be able to make purchases Block & Sons must be able to resell, and that to resell they must meet the market. The parties must be supposed to have had these things in mind.

Unquestionably, the criterion of validity in contracts involving

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a suggestion of restraint of trade is their "tendency" to create a monopoly. But, in a sense, the creation of a corporation involving the combination of the aggregated capital of individuals, the creation of a partnership for the same purpose, or a contract for the entire output of a manufacturer,—and indeed, very many contractual arrangements daily made among men,—do all tend to monopoly. So far, however, from being regarded as objectionable in law, such contracts are held to be the very life of business and trade.

To fall within the inhibition of the law of public policy contracts must in their purpose and scope plainly tend to restraint of trade as an independent factor, or, if this restraint is connected with, and incidental to, another main purpose in itself lawful (as the sale of a business), it must be "unreasonable" in its restrictions measured in time and space.

Taking the contract in question here by its four corners, limited, as we are constrained to consider it, by the rules of construction laid down by the highest authorities and generally followed by courts everywhere, what is there in it that suggests more than is contained in the second above-supposed case?

The decision of the late Justice Jackson—justly esteemed as one of the ablest and best equipped lawyers of his day on the Supreme Bench of the United States—in the case of *Greene, In re*, 7 O. F. D. 245 [52 Fed. Rep. 105], is in many respects instructive in this connection. True, that case was brought under the United States trust act, but the act itself is but an embodiment of the general principles involved in laws invalidating contracts in restraint of trade. Judge Jackson held that a contract for rebates, similar to that here in question was but an effort to "retain patronage against competing manufacturers" and therefore not inhibited by law but a "legitimate method of inducing trade" and did not operate to monopolize trade. To add a bonus to the consideration, in view perhaps of the anticipated magnitude of the transactions to accrue under the contract, does not change its legal character.

There are other cases to the same general effect: See *Corning, In re*, 7 O. F. D. 210 [51 Fed. 205]; *National Distilling Co. v. Importing Co.* 86 Wis. 352 [56 N. W. Rep. 864; 39 Am. Dec. 902]; *State v. Warehouse Co.* 109 La. 64 [33 So. Rep. 81]. The question being, whether the contract stipulations tend to monopoly, the contract cannot be held invalid under this doctrine unless such tendency be plainly shown, and it does not seem to be so shown here.

In the present case, the contract being for a supply of all spirits and alcohol for sale as such in the business of Block & Sons as dealers, and, incidental thereto, a stipulation not to use the product of their

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distillery in conflict with this stipulation, but for conversion into whiskey, etc., only,—no curtailment of ability to supply all public demands necessarily flowing from the contract or being shown by evidence,—how can it be said that the rights of the public are in any way jeopardized or interfered with?

Tested by all the considerations usual in such cases, the contract under consideration here does not fall within any of the classes avoided by the statute or by public policy, but rather within those distinguished as free from objection on those accounts. It is, in fact, to our apprehension, one where the restraint is to such extent only “as to afford a fair protection to the party in favor of whom it is given, and not so large as to interfere with the interest of the public.” Page, Contracts 373, 375 (and a very large number of cases there cited); *Kevil v. Standard Oil Co.* 11 Dec. 114 (8 N. P. 311); *Lange v. Werk*, *supra*.

The construction we place upon the contract has rendered it unnecessary to follow out in detail all the ramifications of argument suggested in the brief of counsel. It may be noted, however, that the only suggestion in the present contract which in any way points to some arrangement exterior to itself, as connected with it in the minds of the parties, is in clause 3 of exhibit A, stipulating for payment into the treasury of the United Spirits Association. This does not affect the main purposes inferable from the language of the contract but is a detail relating to a payment of part of the stipulated consideration to X instead of to Y. It could only become important when performance is challenged and if declared to be void it would be lopped off without affecting the general contract as a separable part of the consideration.

We may also say, in conclusion, that even if we are to regard the existence and effect of an agreement between Block & Sons and the United States Spirits Association as within the purview of the present determination, we would be compelled to hold it to be a collateral and severable matter that would have no necessary bearing on the questions at issue here. Upon the whole case we think the judgment of the court below should be affirmed, and it is so ordered.

Judgment affirmed with costs.

Caldwell, J., concurs.

HOFFHEIMER, J., dissenting.

I am compelled to dissent. My reasons for so doing, stated as briefly as possible, are as follows:

There are two views to be taken of the case, either one of which, in my judgment, bars recovery. The pleaded contract, on its face, appears to be one in general restraint of trade. The promise upon which B. & Sons seek

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recovery is based on a consideration which, to say the least, is in part illegal. Its breach, therefore, cannot be made the predicate of an action at law. The broader aspect of the case, however, carries us beyond what may appear to be the scope of the pleadings. Strictly speaking, however, this is not true. The evidence in the case shows the pleaded contract was inextricably interwoven with another contemporaneous agreement, the manifest object and purpose of all of which was a plan to control the price and output of spirits and alcohol,—a public commodity. 1 Eddy, Combinations Sec. 612, page 580.

The agreement to which I refer was the United States Spirits Association agreement. This agreement was within the contemplation of the parties at the time of the execution of the pleaded contract, as the record shows, and, as a matter of fact, it became effective the very day the pleaded contract was executed; namely, September 14, 1898. The pleaded contract, then, is a part of a plan whereby the control of the manufacture of spirits and alcohol is placed in the hands of the Standard Distilling & Distributing Company, and the distribution of the product is placed in the hands of the United States Spirits Association. By this I mean, the power is vested in the Standard Distilling & Distributing Company, the manufacturer, to fix the price of the goods to be sold to the "authorized dealers," after which the "authorized dealers," comprising the United States Spirits Association, agree to sell such goods to the consumer, at prices not less than those fixed by a committee of said association. The contract, therefore, contemplates not only a condition whereby the quantity to be manufactured may be lessened, but the price, which formerly depended on competition, is arbitrarily left to the Standard Distilling & Distributing Company in the first instance, and to the committee of the United States Spirits Association in the second. Can there be any doubt as to the inevitable tendency of such a contract as to its effect upon the public?

To make this plan possible, B. & Sons, as one of the prospective "authorized dealers," agree to stop producing—to become nonproducers, to sell only the alcohol and spirits of the Standard Distilling & Distributing Company, in return for which they are to receive a certain stipulated sum monthly and also rebates, part of which it seems was to be paid to them directly and part, for their benefit, to the United States Spirits Association, of which, as already indicated, they became members. It thus appears B. & Sons were not only participants in this side contract—a contract forbidden by the statute and common law of our state, or, if the case is to be determined according to Kentucky law, of that state, also—but they were to be beneficiaries under it as well. The active participation by plaintiff below in the

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United States Spirits Association agreement being revealed by the evidence, the class of cases to which belong *Carter-Crume Co. v. Peurrung*, 12 O. F. D. 82 [86 Fed. Rep. 439; 30 C. C. A. 174; 58 U. S. App. 388]; *Hines v. Bank & Tr. Co.* 120 Ga. 711 [48 S. E. Rep. 120]; *Armstrong v. Toler*, 24 U. S. (11 Wheat.) 258 [6 L. Ed. 468], cited by defendant in error, becomes inapplicable. In those cases the party seeking to recover had no knowledge or was not a participant in the alleged illegal scheme.

It is urged by defendant in error, however, that the United States Spirits Association agreement, or evidence relating to it, cannot be considered by the court, because not pleaded as a defense, and it is claimed the court is, therefore, limited to a consideration of the pleaded contract only. The position is not tenable. The answer denies the contract. Evidence of illegality disproves the contract as much as evidence which tends to show that, as a matter of fact, it was never executed. In *Simmons v. Green*, 35 Ohio St. 104, it was held that, in an action to recover damages for breach of a contract, the averments in the answer setting up a different contract were immaterial, except that they operated to deny the making of the contract sued on. In other words, the general denial is a defense that the defendant is entitled to have passed upon and determined, and any evidence which goes to show there could have been no contract, as, for example, in this case, evidence that it was an illegal contract tends to establish that defense. See also *Despatch Line v. Glenny*, 41-Ohio St. 166; *Oscanyan v. Arms Co.* 103 U. S. 261 [26 L. Ed. 539] (opinion of Mr. Justice Field, page 266, Par. 2).

Now, this evidence relating to the United States Spirits Association agreement was in the case for all purposes, and was not ruled out. It tended to prove there was no contract, and I think it was properly before the court for that purpose, under the issues. If, then, the contract sued upon was valid on its face, and not objectionable, it could not give rise to a cause of action, because it was part of a plan forbidden by both Kentucky and Ohio law and in which the plaintiff below was a participant and beneficiary. Whenever it may appear to the court that the contract sued upon, though valid on its face, is in restraint of trade, or is against public policy, it seems the court is not even restricted to the issues joined between the parties.

The reason for the rule is clearly stated in the case of *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615), in which case Judge Shauck, now chief justice of Ohio, said:

"Counsel for the plaintiff in error also insist that the trial court erred in overruling their objections to the evidence by which the defendant showed the negotiations between the parties, the execution of

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contemporaneous agreements between the defendant and other mill owners, and the subsequent correspondence and conduct of the parties touching the machinery and the business of the plaintiff. The trial court was not concerned in ascertaining the rights and duties of parties arising out of a contract confessedly valid as against every consideration of public policy. It was chiefly concerned in ascertaining whether the contract had been entered into for purposes which a due regard to the interests of the public forbid. In its inquiry and judgment it was not even restricted to the issues joined between the parties, for it was its duty to refuse to enforce the contract even though its validity was not challenged by either party. The materiality of the facts which this evidence tended to establish is shown by the cases cited, and the competency of the evidence is thus made to appear."

See also *Emery v. Candle Co.* 47 Ohio St. 320 [24 N. E. Rep. 660; 21 Am. St. Rep. 819]; and in *Baltimore & O. Ry. v. Coal Co.* 61 Ohio St. 242, 251 [55 N. E. Rep. 616], Judge Shauck again says:

"That courts organized to enforce the law will not lend their countenance to a claim founded upon its violation has been long and uniformly held, except in those cases where a departure from principle is required by statute. * * * A recovery in such case is not denied because of any supposed rights of the promisor, but out of that respect for the law in which the courts should not be wanting, although parties may be. The recovery will be denied however and whenever the illegality of the contract upon which a recovery is sought may be made to appear. The defense need not be interposed by the promisor. It could not be effectually waived by him. As was said by Justice Swayne, in *Hall v. Coppel*, 74 U. S. (7 Wall.) 542 [19 L. Ed. 244]: 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons.' "

See also the opinion of Severens, J. (Lurton and Clark, JJ., concurring). In *Cravens v. Carter-Crume Co.* 13 O. F. D. 445 [92 Fed. Rep. 479; 34 C. C. A. 479]. Upon this view of the case alone the judgment was wrong, and should have been in favor of plaintiff in error, defendant below.

If this view is not correct, then I think plaintiff in error is still entitled to judgment upon the ground first stated herein, namely, that the pleaded contract, upon its face, shows that the promise sued on was based on a consideration in part illegal. Its breach warrants no recovery. The promise of B. & Sons to cease producing was unreasonable. By applying the ordinary rules of construction to the contract,

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unless resort be had to transposition of words and phrases, which, in my judgment, works violence to the manifest intent of the parties, B. & Sons agree to stop producing alcohol and spirits for sale as such, not only at the Kentucky distillery, but elsewhere. In legal effect, they promise not to manufacture such articles "directly or indirectly" anywhere. This would include the entire state of Ohio. Whatever rule may obtain elsewhere,—and a different rule does obtain in many jurisdictions,—Ohio adheres to the earlier rule announced in *Lufkin-Rule Co. v. Fringeli*, a restriction which is coextensive with the lines of the state is illegal. *Lufkin-Rule Co. v. Fringeli*, 57 Ohio St. 596 [49 N. E. Rep. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736]; Harriman, Contracts Sec. 215, 216a.

And even if we endeavor to uphold the contract, for courts seek to uphold contracts whenever that is possible, and by some construction we limit the restriction to the Kentucky zone (Darling distillery), and hold that the restriction, because of the limitation, is not unreasonable, it would still be void, unless it can be shown to be ancillary to some main valid contract whose purpose it furthers or subserves.

Judge Taft, in *United States v. Pipe & Steel Co.* 85 Fed. Rep. 271 [29 C. C. A. 141; 54 U. S. App. 723], sets out the nature of such contracts. But the contract between the parties in the instant case gives rise to none of the relations which would justify the restriction as ancillary. When the demurrer was passed upon by the court below, it was assumed that the contract gave rise to and established a relation of agency as between the parties, and therefore the court overruled the demurrer.

The court believed the language employed imported agency, and that the restriction was necessary to enable the Standard Distilling & Distributing Company to enjoy the fruits of its contract. This assumption of agency was probably based on language in the petition suggestive of agency. By oversight apparent from the language of the court in its decision, *Block v. Distilling & Distrib. Co.* 11 Dec. 145 (8 N. P. 313), the court, in passing on the demurrer, had before it the original petition and not the amended petition. The latter, it appears, had been filed as a result of a motion directed to the original petition, to make the same more definite and certain. The original petition contained an averment that "it was agreed that the plaintiff should be appointed one of the authorized agents or distributors of defendant's product." The amended petition contains no such language, but avers "enter into a written contract by which it was agreed that the plaintiff should be one of the authorized dealers of the defendant, under an instrument appointing them such dealers, a copy of which was attached to, and made part of, said contract as exhibit A. By said

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exhibit A defendant appointed plaintiffs for five years from said date one of the authorized distributors (meaning dealers) of defendant. By the word 'dealers' or 'distributors' were intended those who agreed to buy from the defendant in large quantities for the purpose of selling or distributing to the trade in smaller quantities."

If there were any ambiguity as to the term "authorized dealers," the court, according to the well-established rule, may look to the construction placed upon it by the parties. Here, then, we find plaintiff below expressly discarding a technical term in itself suggestive of agency for one that suggests the relation of buyer and seller merely. To say the least, it would seem plaintiff below did not believe that the contract created an agency.

But, assuming that this act was not conclusive, and conceding that there is no "magic in words," still agency cannot be said to exist unless the usual tests can be applied. See *Mechem*, Agency Par. 1; 1 *Livermore*, Agency 67; 2 *Bouvier*, Institutes of Am. Law 3.

If there could have been any doubt about the true relation created by the contract, when the demurrer was acted upon, certainly all doubt must disappear on reading the testimony of the parties themselves. See the depositions, *S. T. Block*, exhibit 113, questions 50 to 55, deposition page 46. Also *E. J. Mack*, exhibit 113, questions 34 to 43.

The distinguishing features of the agent, are his "representative character and his derivative authority." *Mechem*, Agency, *supra*. These elements, under the evidence, are entirely lacking. The relation intended to be and actually created must be held to be that of buyer and seller merely, and not that of principal and agent.

The following cases would seem to be decisive: *Russell v. McSwegman*, 84 N. Y. Supp. 614; *Towle v. White*, 21 W. L. 465 (H. & L.); *Vosbury v. Mallory*, 70 App. Div. 247 [75 N. Y. Supp. 480]; *Roosevelt v. Nusbaum*, 75 App. Div. 117 [77 N. Y. Supp. 457]; *Tady v. Sterious*, L. R. 1 Ch. 354; *White, Ex parte; Nevill, In re*, L. R. 6 Ch. 397.

Under the authorities, the restriction cannot be upheld as ancillary to such a relation as that contemplated. It will be borne in mind that this is not a case of a restriction to protect "good will." It was purely a case—to borrow the language of Judge Minshall—where the Standard Distilling & Distributing Company sought to buy B. & Sons "out of business," so far as making alcohol and spirits for sale as such was concerned. *Lufkin Rule Co. v. Fringeli, supra*.

The only other agreement or contract whose purpose the restriction could be said to subserve is the United States Spirits Association agreement. But this contract, on its face, is in contravention of the Valentine law, 93 O. L. 143 (Rev. Stat. 4427-1; Lan. 7586), and the common and statute law of Kentucky. It, being void because illegal,

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cannot be made the predicate of a valid ancillary contract. As I view the contract, therefore, it presents an agreement of B. & Sons, for a certain consideration to be paid by the Standard Distilling & Distributing Company, not to manufacture or produce, for sale as such, alcohol or spirits, for five years, and to buy all their needed alcohol and spirits from the Standard Distilling & Distributing Company. This is in general restraint of trade, and is forbidden by law. By permitting the plaintiff below to recover the amount promised for doing that which the law distinctly forbids, the court would be placed in the anomalous position of placing a premium on that which the law declares shall not be done.

Even if this provision in the agreement was bad, can it be severed and eliminated and the good be enforced? This view seems to have obtained when the cause was heard on its merits before a court other than the one that passed on the demurrer. But I am of opinion that the authorities forbid this, also. Legal promises, it is true, may be severed from illegal ones; but the legal part of the consideration cannot be severed from the illegal part. The good, *ex necessitate*, falls with the bad. The consideration of the promise of the Standard Distilling & Distributing Company to pay B. & Sons a stipulated monthly sum, had for its basis the promise of B. & Sons not to manufacture or produce spirits and alcohol for sale as such. To say the least, this was part of the consideration. This promise, being in contravention of law, cannot be made the basis of the counter promise of the Standard Distilling & Distributing Company. The legal maxim, "*Ex turpi contractu non oritur actio*," applies in all its force. *Bishop v. Palmer*, 146 Mass. 469 [16 N. E. Rep. 299; 4 Am. St. Rep. 339]; *Lange v. Werk*, 2 Ohio St. 519; *Widoe v. Webb*, 20 Ohio St. 431; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Bridge v. Cage*, 2 Croke 103; *Douthart v. Congdon*, 197 Ill. 349 [64 N. E. Rep. 348; 90 Am. St. Rep. 167]; *Filson v. Himes*, 5 Pa. St. 452 [47 Am. Dec. 422]; *Foley v. Spier*, 100 N. Y. 552 [3 N. E. Rep. 477]; *Burke v. Child*, 88 U. S. (21 Wall.) 441 [22 L. Ed. 623].

For these reasons I am of opinion that the court below erred in overruling the demurrer, and upon the whole case I think the judgment was against the evidence and the law. I think the judgment should be reversed and judgment entered up for plaintiff in error.

Superior Court of Cincinnati.

ASSAULT AND BATTERY—PLEADINGS.

[Superior Court of Cincinnati, Special Term, February 16, 1907.]

WILLIAM OETTING V. JOHN MILLER ET AL.

1. SUFFICIENCY OF PETITION IN ASSAULT AND BATTERY ACTION.

In an action to recover for an assault and battery it is not necessary to allege malice.

[For other cases in point, see 1 Cyc. Dig., "Assault and Battery," §§ 25-37.—Ed.]

2. ADMISSIBILITY OF EVIDENCE TO SHOW MOTIVE.

Under a charge of assault without provocation, evidence is admissible to show the character and motive of the assault.

[For other cases in point, see 1 Cyc. Dig., "Assault and Battery," §§ 36-44.—Ed.]

[Syllabus approved by the court.]

A. C. Fricke and T. L. Michie, for plaintiff.

C. F. Williams, for defendants.

HOSEA, J.

The petition in this case embodies two distinct causes of action, namely: (1) False arrest, (2) assault and battery. These are distinct and separate matters of pleading and the motion to this point will be granted.

The charge of assault and battery goes quite beyond the necessary requirements of pleading and should be revised. In such action it is not necessary to allege malice, nor, indeed any other matters of aggravation merely evidential. A plain and concise statement of the facts only is necessary or permissible. Under a charge of assault without provocation and with force and violence, evidence is admissible to show the character and motive of the assault and enable the jury to determine the question of exemplary damages. 2 Greenleaf, Evidence Sec. 82, 89; *Klein v. Thompson*, 19 Ohio St. 569.

"The manner, motives, place, and circumstances of the assault, though tending to increase the damages, need not be specially stated, but may be shown in evidence." Greenleaf, Evidence Sec. 89.

The motion to this feature of the pleading is directed to the words, "tramped upon his face" (line 16), which is obscure, and the words, "and has been greatly humiliated and wounded in his feelings and grievously and grossly insulted" (lines 19, 20).

Such expressions besides being unnecessary in pleading are calculated to prejudice a jury at the outset, and are objectionable. The prior allegation of "assaulted, beat, bruised, wounded and injured," is quite sufficient to cover any phases of injury, especially when taken in connection with the specification of results, which follows. The rest is surplusage; but as the motion is confined in scope, it will be granted in respect of the particular expression noted.

Motions granted and amendments to be made forthwith without delaying trial.

State v. Commissioners.

COUNTY FUNDS—DEPOSITORIES.

[Defiance Common Pleas, September 25, 1906.]

STATE EX REL. DEFIANCE CITY BANK CO. V. DEFIANCE CO. (COMRS.).

1. EFFECT OF PASSING ON A PROPOSITION BY ONE JUDGE OF A COURT.

Where one judge of a court passes on the merits of a proposition, another judge of the same court is not disposed afterwards to question the correctness of such rulings.

2. MODE OF ATTACKING DEFECTIVE ALTERNATIVE WRITS.

Defects in an alternative writ of mandamus should be reached by a motion to quash, and when such a writ is attached to a petition in mandamus, a demurrer to both petition and writ is not available as the opportunity for the motion to quash has past.

[For other cases in point, see 5 Cyc. Dig., "Mandamus," §§ 416-424.—Ed.]

3. APPEAL DOES NOT LIE FROM REFUSAL OF COUNTY COMMISSIONERS TO PERFORM A MINISTERIAL DUTY.

Appeal lies under Rev. Stat. 896 (Lan. 2165) only from decision of county commissioners made in matters of claim or demand upon the county in its *quasi*-corporate capacity; hence appeal will not lie from a refusal of the commissioners to accept a bid from a bank for a depository of county funds.

[For other cases in point, see 1 Cyc. Dig., "Appeals," §§ 20-24.—Ed.]

4. SUFFICIENCY OF BID FOR DEPOSITORY FOR PUBLIC FUNDS.

A bid as depository for county funds that specified the "daily balance," as the basis for the computation of the interest to be paid, is a substantial compliance with the statutory provision that requires the computation of interest to be from the "average daily balance" of the deposits, and such a bid is not objectionable for noncompliance with the statute.

[For other cases in point, see 3 Cyc. Dig., "Counties," §§ 364-407.—Ed.]

5. EFFECT OF MANDAMUS TO COMPEL COMMISSIONER TO DECLARE A RELATOR HIGHEST BIDDER FOR PUBLIC FUNDS.

Proceedings for mandamus to compel county commissioners to declare the relator to be the highest bidder for the deposit of public funds does not attempt to require the commissioners to decide whether or not the relator is competent to perform its bid, or whether or not it is a safe depository for public funds, and it is not necessary to attach to the petition an undertaking for the protection of the county.

6. SUFFICIENCY OF PETITION IN MANDAMUS AGAINST COUNTY COMMISSIONERS.

Petition for a writ of mandamus to compel county commissioners to declare the relator to be the highest bidder for county funds that shows the relator to be a bank within the requirements of the statute; that all the steps required by law have been taken by the commissioners; that relator's bid was properly filed, and was definite in its terms both as to amount of the interest offered, and as to the character of the sureties offered; that relator's bid was the highest bid offered, and that defendant refused to and fails to designate relator as the depository, states facts sufficient to constitute a cause of action.

[For other cases in point, see 5 Cyc. Dig., "Mandamus," §§ 391-404.—Ed.]

DEMURRER to petition and alternative writ.

Winn & Hay and H. B. Harris, for plaintiff.

Henry & Robert Newbegin and D. F. Openlander, for defendant.

Defiance Common Pleas.

KILLITS, J.

This cause is before the court at this time upon demurrer to the petition and alternative writ. The petition avers that the relator is a bank organized under the laws of the state of Ohio, having its principal place of business in the city of Defiance, the county seat of Defiance county, Ohio, of which county it is "an inhabitant and resident;" that about August 9, 1906, the defendant board of county commissioners published the notice required by law in two papers within said county, inviting sealed proposals from the several banks and trust companies within said county to become depository of the public moneys of said county, setting forth in said notice the conditions required by law to be embodied in such proposals, and the time and place when and at which the said defendant board would receive and open proposals and act thereon; that prior to the time limited for the filing of such proposals, the relator caused to be filed with the county auditor in that behalf its sealed proposal, in these words, omitting caption and address:

"We, the Defiance City Bank Company, offer you our services, to act as your county depository, and offer you on the daily balances for all money deposited, the sum of four and four tenths (4 and 4-10) per cent per annum. We offer the following surety companies as bondsmen: The United States Fidelity & Guaranty Company, of Baltimore, Md.; the Bankers Surety, of Cleveland, Ohio; the Aetna Indemnity Co., of Hartford, Conn.; the National Surety Co., of New York; the American Surety Co., of New York; the Fidelity & Deposit Co., of Baltimore, Md.

"THE DEFIANCE CITY BANK COMPANY,
"By C. C. KUHN, President."

That this written proposal was made by relator for the purpose of obtaining the right to be and of being designated as the depository of the public funds of said county, and for the use of the money of said county for the ensuing three years; that the six fidelity and indemnity insurance companies named and offered in said proposals as relator's proposed sureties on its bond, should said proposition be accepted, were each authorized to do business, as such, within the state of Ohio, and that each of said companies had and still has a paid up capital stock of more than \$250,000, and that each was an eligible and competent surety in the premises; that the relator "was able, ready and willing to carry out and comply with its said proposal, furnish good and sufficient sureties as required by law and to the satisfaction of said county commissioners, and it was able, ready and willing to care for, account for, and pay over all money coming to its possession as such depository, and pay interest on the funds of said county at the rate stipulated in its said proposal, if the funds of the county were awarded to it by said county commissioners;" that at the time and place fixed in said notice this

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proposal of relator, as well as the proposals of other institutions of the county, received in the same behalf, were duly opened by the defendant board of county commissioners, and that then and there said defendant board found that relator's proposal offered 4 4-10 per cent per annum interest on the average daily balances of the county funds to be deposited with it, and that said bid of said relator was, in that behalf, higher than any other proposal offered before said board; that the next highest proposal offered no more than 4 35-100 per cent; but that the said board refused, nevertheless, then and there, or at any time, to designate relator as the county depository of said county for the term fixed by law, and failed and refused to award relator the use of the county moneys upon its said proposal, and still so fails and refuses to perform its duty upon said proposal; that the amount of money to be deposited at any one time during the ensuing three years with the county depository of said county cannot and will not reach the sum of \$400,000. The prayer is for a writ of mandamus addressed to the board of county commissioners of Defiance county, Ohio, directing that body to accept the proposal of the relator and to award to it the use of the funds of said county upon the terms of said proposal for the ensuing three years, provided relator qualifies with sureties as provided by law.

Upon the filing of this petition an alternative writ was issued by another judge of this district, and to the alternative writ and the petition defendant demurs:

First, that it appears upon the face of the writ that it was issued without jurisdiction or authority of law; second, that it appears on the face of the writ that this court has no jurisdiction of the subject-matter; third, that this court has no jurisdiction herein; fourth, that it appears upon the face of the petition and writ that the relator has a plain and adequate remedy at law; fifth, that the writ and petition do not state facts sufficient to constitute a cause of action.

The first three grounds of the demurrer are based on the fact that the alternative writ was ordered by a judge of this court sitting at chambers, and outside of Defiance county. Their merits have already been passed upon adversely to defendant by another judge of this court, who heard and overruled defendant's motion to the jurisdiction, based upon such a contention. This court has no disposition to suspect the correctness of that decision, and will therefore, without further consideration, overrule the demurrer, so far as the first three grounds are concerned, to which defendant may have exceptions.

Before passing to a consideration of the remaining grounds of demurrer specifically, there should be noticed an objection to the writ advanced in support of the demurrer and based upon the manner in which the copy of the petition is carried by the writ. The writ begins,

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after caption and address, as follows: "Whereas on the twenty-eighth day of August, A. D. 1906, a petition for a writ of mandamus, duly verified, was filed in the office of the clerk of the court of common pleas of Defiance county, state of Ohio, a true copy of which petition is hereto attached marked exhibit 'A,' and hereby made a part of this writ;" and following with a recitation of the presentation to Judge Matthias, at chambers, and a copy of his order, and concluding with the writ based thereon. Bound therewith is a document purporting to be a copy of the petition, marked exhibit "A," but not certified as such. The last page of this copy is occupied in part by the sheriff's return of his service of the writ, in which it is averred that a true copy of the writ, together with all indorsements thereon and exhibits thereto, was duly served upon defendant. The whole is bound together within a binder cover which is indorsed over the signature of the clerk of this court, after a statement of the docket number and title of this cause, as follows: "Alternative writ of mandamus."

It is objected that, because the copy of the petition is attached to the writ as an exhibit and not carried in the body thereof, the writ is defective and such defect is available on general demurrer. The objection is based upon the provision of Rev. Stat. 6747 (Lan. 10340) that,

"The writ shall be issued by the clerk of the court in which the application is made, and shall contain a copy of the petition, verification, and order of allowance," etc.

It will be noticed that, in distinction to the old practice in which (Sec. 577 code, S. & C. 1127; see Rev. Stat. 6751, 6752; Lan. 10344, 10345) the writ itself was treated as a pleading and sustained all the functions of a declaration, it is now but a vehicle by means of which both the orders of the court and the vital pleading in the cause, the petition, are conveyed to the defendant. It is no longer proper practice to address a demurrer to the writ, but to the petition, which is the real pleading and declaration on the part of the relator. *State v. Dalton*, 1 C. D. 71 (1 R. 119).

We are of the opinion that a defect in the writ must be reached by motion to quash, and that, if that opportunity is passed, it is no longer available on demurrer to the petition, even though, as in this case, the demurrer is addressed to both petition and writ.

It is urged strenuously in argument that the relator has a remedy at law, either by way of appeal from the decision of the commissioners, or by proceeding in error. As to the remedy by way of appeal, it has been several times decided in this state that appeal lies, under Rev. Stat. 896 (Lan. 2165), only from decisions of the commissioners made in matters of claim or demand upon the county in its *quasi*-corporate capacity. It cannot be said that, upon the facts stated in the petition,

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relator has any claim or demand upon the county in that capacity. We cite but one case, out of several, namely, *Bowersox v. Seneca Co. (Comrs.)*, 20 Ohio St. 496; but *Noble Co. (Comrs.) v. Hunt*, 33 Ohio St. 169, may be considered of interest in the same connection.

Assuming, which the court very much doubts, that the commissioners are bound by the statutes relating to the selection of a county depository to make a record of their proceedings of sufficient fullness as to exhibit their refusal to award the deposits to relator and the errors thereby committed by them, whether or not error would lie from such a record to this court depends upon the consideration of the nature of the function performed by the commissioners in designating a depository, a consideration which lies at the foundation of the question involved generally in this cause, and will be taken up in discussing the last ground of the demurrer,—that the petition and writ do not state facts sufficient to constitute a cause of action, for error lies to this court from a tribunal inferior to it, only upon a decision thereof arrived at through the exercise of judicial functions. If the act of designating a depository is a judicial function, under the statutes in that behalf, then, of course relator has a remedy at law, and equally, of course, mandamus will not lie to control the board in the exercise of such a function, upon familiar principles; wherefore, clearly, a petition setting forth such a situation must fail to state facts sufficient to constitute a cause of action. If, on the other hand, the action of the commissioners is simply ministerial, error will not lie, and no remedy at law exists to the benefit of relator.

The statutes involved in this controversy are Lan. 1657 to 1665 (B. 1136-1 to 1136-9), as amended April 16, 1906 (98 O. L. 274). Section 1 of the amended act, provides that,

“In each county the commissioners thereof shall designate in the manner hereinafter provided, a bank or banks * * * as a depository or depositories of the money of the county,” etc.

Section 2 provides for a notice of the time and place for receiving and opening bids; and Sec. 3 says:

“The commissioners shall, in open session, open such sealed proposals, and shall award the use of the money of the county to the bank or banks or trust companies that offers the highest rate of interest therefor, on the average daily balance, provided proper sureties, or securities, or both, are tendered in such proposal,” etc.

We need go no farther in referring to the terms of this act, for the circumstances of this case carry us no farther than this. This action is not brought to compel the officers of the county to make deposits of public moneys with relator, but simply to secure a designation of relator as the potential or prospective county depository, to fructify into a reality after additional steps have been taken. Given, the combination

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of a bank answering the description of Sec. I, and a sealed written proposal made by it for the county funds, properly filed before the time fixed for opening the same, pursuant to a proper notice, and with the proper officer to receive and note the filing thereof, the proposal not only containing the highest offer of rate of interest, but a tender of sureties such as the law contemplates are competent in such cases, we are very clearly of the opinion that the function of the commissioners in such a case is purely ministerial, and that their duty to designate then and there such a bank as the county depository is imperative and unavoidable. It seems very certain to us that such an act is no more judicial in its nature than that of a judge signing an indisputable bill of exceptions, or of the commissioners delivering bonds issued to pay for improvements, or of a board of education in appropriating money to the payment of bonds already issued, or of numerous other acts by officers or tribunals which have been directed by the courts of this state.

We are urged to consider the fiduciary character of the relation of the county commissioners towards the county funds, and it is urged that such a situation necessarily implies a discretion on their part with reference thereto. In that connection, attention is called to the conditions of the bond given by each commissioner, and it is suggested that the members of the board might become responsible upon their bonds for a loss of the public moneys in a depository, wherefore they should be allowed a discretion to choose the very soundest financial institution for that trust, notwithstanding the plain terms of the sections above quoted. It is a sufficient answer to this argument that the sole condition of a county commissioner's bond is, that he shall faithfully perform the duties of his office (Rev. Stat. 844; Lan. 2103) and it is but "seeing things" to imagine that, faithfully following the terms of a statute as plain as this, an officer could be involved in default upon his bond should a loss ensue therefrom to the public. Our conclusion that the commissioners have no discretion in this matter down to the point of designating the prospective county depository, as shown by the opened proposals, is sustained by the authorities. *Boren v. Darke Co. (Comrs.)* 21 Ohio St. 311; *State v. Marion Co. (Comrs.)* 39 Ohio St. 188; *Knorr v. Miller*, 3 Circ. Dec. 297 (5 R. 609).

Holding, therefore, that the act of the commissioners to be performed when the proposals are opened, is ministerial, it follows that a bank aggrieved thereby is without remedy by way of proceedings in error.

It is urged specifically upon the ground that the petition does not state facts sufficient, that it appears from the terms of relator's bid that it did not comply with the statute, in that the bid is based upon "daily balances;" whereas the statute speaks at all times of "average

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daily balances." In the argument some confusion arose as to the meaning of the term "average daily balances," and speculation was indulged in as to whether the statute might not be considered defective for want of a specification of the period for which an average should be found. It is clear, from a quiet reading of the statute, however, that the statute means that annually the amount to be paid by the depository as interest must be computed by the application of the rate bid to the sum found by adding the balances for each business day of the previous year together and dividing the result by the number of business days. It is obvious that the result would be practically the same as that obtained by computing the interest on each daily balance for one or more days according as the next day was a business day, or not, and adding the numerous computations together; hence there is no substantial difference between the expression of the statute and that of the proposal; inevitably they lead to the same result.

It is also urged in argument that the petition is defective in that it does not tender the undertakings which relator must give in order to have its rights to the county deposit perfected; in which behalf counsel for defendant insist that relator is asking for what amounts to an alias alternative writ, which is impossible. In our view of the facts of this case, the time has not yet come when relator may demand the county deposits. All that relator can, and does in fact, ask at this time is a designation of it, by the defendant, as the county depository, and an opportunity to give a bond as such, in an amount to be fixed by the commissioners. In advance of a determination of the amount of bond required, to be fixed by the commissioners pursuant to Sec. 4 of the act, relator cannot tender its bond; nor is it within the province of the court, in this action, to pass upon the sufficiency of the bond should the same have been tendered. Such is peculiarly the function of the commissioners and the prosecuting attorney, by the provisions of Secs. 4 and 5 of the act. It would have been both premature and useless at this time for relator to have tendered a bond, either to the court or to the commissioners.

To meet the requirements of the situation, at this juncture, in the proceedings, all that is incumbent on relator is to be found in position to give such bond as the commissioners may hereafter require. So far the presumption is, that relator will, at the proper time, meet the conditions. It tenders proper securities, such as the law determines are competent, and such tender carries with it of necessity the offer of readiness to meet all reasonable demands of the commissioners as to the amount and terms of the bond. The averment in that behalf, which we have quoted from the petition and which the demurrer admits, is entirely unnecessary. Hence, it follows that at no time does the question arise whether or not the highest bidder is competent to perform

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the bid, whether or not it is a safe depository of the public funds. The law, as we read it, assumes that any local institution, furnishing the proper security, is a safe depository, and no issue on this question can possibly arise, either at the stage of proceeding under the depository act at which the case stands, or later, when the designated depository offers the bond required. The only place under the act at which any discretion or *quasi-judicial* function inheres in the commissioners is in the matter of determination of the amount of the bond.

Does the petition state sufficient facts? That question must be answered in the affirmative, after a comparison of the averments, given in substance at the outset of this petition, with the requirements provided by the act. The relator is described and averred to be such a bank as is embraced within the statute in every particular, both as to organization and location; all the steps required by law to be taken looking to a lawful letting, have been taken by the commissioners; relator's bid was sealed and properly filed within the limit of the time; the proposal was clearly expressed, and was definite in its terms both as to the amount of the interest offered, and as to the character of the surety offered, which is such as came within the provisions of Sec. 4 of the act relating to the offering of fidelity companies; relator's offer was the highest by an appreciable margin; defendant refuses and fails to designate relator as the depository. It is difficult to see what more was necessary to be averred in this petition to entitle relator to relief, assuming that the court's view of the law is correct, and we, therefore, find that the demurrer should be overruled on this last ground also, for, as in other cases, the demurrer is to be taken as an admission that the several averments of the petition are true.

DRAINS AND DITCHES.

[Darke Common Pleas, October Term, 1906.]

*CLEVELAND, C. C. & ST. L. RY. v. DARKE, MIAMI & SHELBY COS. (JOINT BD. OF COMRS.).

APPLICATION FOR COMPENSATION AND DAMAGES IN DITCH PROCEEDINGS TO BE MADE, WHEN.

Applications for compensation and damages by landowners in ditch proceedings are required to be made on or before the day set for hearing of applications for compensation and damages and for approval of the report of the county surveyor, and are not barred if not made on or before the day set for hearing upon the petition for the improvement.

[For other cases in point, see 3 Cyc. Dig., "Drains and Ditches," §§ 63-64.—Ed.]

[Syllabus by the court.]

*Affirmed by circuit court, May term, 1907.

Railway v. Commissioners.

ERROR to Darke probate court.

J. C. Clark and A. L. Clark, for plaintiff in error.

H. L. Yount and O. R. Krickenger, for defendants in error.

ALLREAD, J.

This is a proceeding in error from the action of the probate court dismissing the proceedings on appeal in a ditch case on the question of compensation and damages.

The record and transcript of the joint board of commissioners filed with the probate judge as the foundation of the appeal shows that on January 1, 1906, a petition for a ditch upon certain route and termini therein described, and signed by certain landowners, was filed with the auditor of Darke county, Ohio. It does not appear from the petition itself to have been addressed to the joint boards of Darke, Miami and Shelby counties, but the auditor so entitled the proceedings, and the commissioners so recognized it.

On February 1, 1906, the day set by the auditor, the commissioners of Darke county and Miami county, attended, and adjourned to March 12, when the three boards met and granted the prayer of the petition and fixed June 15 to hear the engineer's report, and also adjourned to April 5 to complete their findings on the ditch. On April 5 the boards made a formal finding, establishing the ditch and certain laterals. They further found that the bridge and culvert where the railway crosses the ditch was not of sufficient capacity and an obstruction, and that its enlargement was necessary. Proceedings were adjourned to June 1, and the engineer ordered in the meantime to make a survey, plat, plans, etc., for the railway bridge, and report. On June 1 the engineer presented his report as to the culvert and bridge. The railway company being represented by counsel, a hearing was had, upon their objections to the order and the commissioners reiterated their previous findings as to the bridge and ordered the railway company to remove the middle pier of the bridge at their own expense within three months, and upon their failure it was provided that the joint board should proceed to do so at the railway company's expense. The further hearing of the ditch improvement was then adjourned to June 15. On which date the joint board met pursuant to adjournment, and certain motions were presented by the railway company and overruled. Another adjournment was then had to June 24, upon the ground that the engineer did not have the assessment ready.

On June 24 a claim for damages on behalf of the railway company was filed and presented to the joint board. This claim was refused, and an appeal was thereupon taken to the probate court, where, upon motion of the commissioners, the cause and proceedings were dismissed. The force and effect of the final entry and order in the probate court was to

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deny the railway company a hearing upon appeal. There was nothing pending in the probate court but the claim for compensation and damages, and it is therefor not material whether the order made by the probate court be considered a dismissal of the appeal or a dismissal of the proceedings, as it amounted in either case to a denial of a hearing of the claim upon appeal.

Whether the probate court erred in doing this depends upon whether the railway company filed its claim for compensation and damages within the statutory time.

The question of the limitation of the time for filing applications for compensation and damages in ditch cases has been a subject of uncertainty and confusion since the passage of the act of April 19, 1894 (91 O. L. 160).

Previous to the act of 1894, upon the filing of a petition for a ditch, the county commissioners went upon the line of the ditch and determined from view as to the necessity for the ditch. If they found in favor of the ditch they appointed an engineer and ordered him to go upon the line of the ditch, mark it, and make out and present plans, specifications and profiles, and also an assessment. When this was returned a day of hearing was fixed and notice given to the landowners. Revised Statute 4460 (Lan. 7643) then provided that applications for compensation and damages should be filed and presented to the commissioners on or before the day so fixed. There was no ambiguity in the law as it then stood. The landowner was afforded a reasonable and fair opportunity to present his claim, and upon failing to do so he was barred. *Cupp v. Seneca Co. (Comrs.)* 19 Ohio St. 178.

At the time so fixed for the hearing upon the ditch and the filing of claims for compensation and damages the ditch had been actually located, marked out, and plans and profiles and specifications were on file in the commissioner's office. By the act of 1894 the procedure was radically changed. Upon the filing of a ditch petition, under the latter act, the auditor was required to fix a day when the commissioners would meet at the head of the ditch after notice to all parties interested and proceed to the preliminary hearing as to whether the ditch was necessary, etc., and they were authorized to adjourn from day to day until the hearing was completed and the report and finding made. Then the engineer was ordered to make out his plans, assessments, etc., and a second day for hearing upon the assessment was provided for.

In the act of 1894, Rev. Stat. 4460 (Lan. 7643) was amended so as to provide that the landowner might file his claim for compensation and damages at any time before the day set for hearing as provided in Rev. Stat. 4452 (Lan. 7635). The uncertainty in the construction of this act arises from the fact that there are two days of hearing referred to in Rev. Stat. 4452 (Lan. 7635). One is the hearing upon the petition,

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which has been heretofore referred to, and the other arises by the following provision at the conclusion of the section, to wit:

“In case said commissioners find for said improvement, they shall fix a day for the hearing of application” for compensation and damages.

It is contended by the commissioners that the proper interpretation of Rev. Stat. 4460 (Lan. 7643) is, that the applications for compensation and damages shall be filed on or before the day set for hearing upon the petition; while the plaintiff in error contends that such applications may be filed on or before the day fixed specially for hearings upon claims of that kind. In determining as to the construction to be given to Rev. Stat. 4460 (Lan. 7643) it must be remembered that the right of the landowner to compensation and damages is one favored by the constitution and calls for such an interpretation as would reasonably and fairly preserve, rather than one that tended to destroy, the landowners' right. A strict and technical interpretation of the language of Rev. Stat. 4460 (Lan. 7643) would point to the holding of the latter day referred to in Rev. Stat. 4452 (Lan. 7635), for that is the only “day set for hearing” as provided in the section named. The day of hearing on the petition is fixed by Rev. Stat. 4451a (Lan. 7634) and is referred to in Rev. Stat. 4452 (Lan. 7635) simply as the “day so fixed.” However, this is a narrow construction and should not be followed unless it also agrees with the reason and spirit of the statute.

A careful consideration of the radical difference in procedure created by the act of 1894 justifies, in the opinion of the court, the conclusion that the legislature intended the latter date prescribed in Rev. Stat. 4452 (Lan. 7635) as the limitation for the filing of applications for compensation and damages, and not the day set for hearing upon the ditch petition. To hold that a landowner should file an application for compensation and damages on or before the first day of the hearing upon the ditch petition is exceedingly unfair. The ditch has not yet been determined upon, its location has not been defined, nor its width determined, nor the character of the improvement, whether open ditch or tile, and inasmuch as the commissioners are authorized to adjourn from day to day these facts may not be known to the landowner for many days after the time when his limitation for filing his claim for compensation and damages has expired, if we take the view contended for by the commissioners.

The landowner may be satisfied to make no claim for compensation and damages if the ditch is tiled, or if it follows a certain line, or if it is only of a certain width, and yet, under the construction contended for, he would be bound to make his application in the beginning, without knowing what his application would cover. If the latter interpretation is correct, then the landowner has a reasonable and fair

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opportunity to file his claim after the character of the improvement is known. Under this interpretation of Rev. Stat. 4460 (Lan. 7643) the claim of the railroad company for compensation and damages was filed with the commissioners in due time, and upon its rejection by them, the railway company had a right to appeal and to have its claim duly heard. The dismissal of the cause or proceedings in the probate court was therefore error. Judgment reversed.

DOWER—GIFTS—HUSBAND AND WIFE.

[Superior Court of Cincinnati, Special Term, March, 1907.]

WILLIAM C. McLEAN, ADMR. V. ELLA A. MILLER, EXRX.

1. PRESUMPTION ARISING FROM POSSESSION OF WIFE'S PROPERTY BY THE HUSBAND.

Where a husband assumes possession and control of his wife's separate property, it is to be presumed that he holds the same as agent, or trustee for her; and, where it is claimed the complete title is in the husband, the burden is on him, or those holding under him, to prove the wife's assent to his ownership.

[For other cases in point, see 5 Cyc. Dig., "Husband and Wife," §§ 489-493.—Ed.]

2. RIGHTS OF WIFE AS AFFECTED BY STATUTE OF LIMITATIONS.

The statute of limitations does not run against a wife during coverture, and a presumption of payment from lapse of time will not prevail against her; nor will continued silence constitute such laches as will estop her, or her representatives, from later asserting her rights.

[For other cases in point, see 5 Cyc. Dig., "Husband and Wife," §§ 473-477.—Ed.]

3. EFFECT ON WIFE'S CLAIM AGAINST HUSBAND BY ELECTING TO TAKE UNDER HIS WILL.

Where a husband, who has possession and control of his wife's separate estate, provides for her in his will, and she elects to take under the will, she is not thereby barred from asserting her claim to her separate estate, as the election to take under the will is not as creditor, but as widow, and affects only her interest in the husband's property.

[For other cases in point, see 3 Cyc. Dig., "Dower," §§ 165-178; 7 Cyc. Dig., "Wills," §§ 1223-1236.—Ed.]

4. SUFFICIENCY OF EVIDENCE TO ESTABLISH GIFT FROM WIFE TO HUSBAND.

The fact that a husband has had possession and control of his wife's separate property for a number of years without her asserting any ownership of same, together with statements and declarations of the wife to the effect that she "had nothing," and "Everything is pa's," or "Everything I have is Ella's," does not constitute evidence sufficient to establish a gift *inter vivos* to the husband.

[For other cases in point, see 4 Cyc. Dig., "Gifts," § 87; 4 Cyc. Dig., "Evidence," §§ 3969-3970.—Ed.]

[Syllabus approved by the court.]

William McLean and Edward Barton, for plaintiff.

J. C. Healy, Malcolm McAvoy and M. F. Wilson, for defendant.

McLean v. Miller.

HOFFHEIMER, J.

This was an action for money had and received. The amount claimed is \$26,500 and interest from September 6, 1872. By agreement between the parties, a jury was waived and the cause was submitted on the evidence and the law.

Briefly the facts are as follows:

In March, 1868, Susan B. Palmer, a widow, married Samuel Mills, widower. No child was born of this union. Mrs. Palmer Mills had no children by her first marriage, and Mr. Mills had a daughter, Ella Mills, the defendant in this action. Husband and wife and this daughter of Mr. Mills lived together until 1884, when Ella Mills married one John Miller. Samuel Mills died in November, 1897. Susan B. Mills died in January, 1898.

The evidence shows that in August, 1866, and in August, 1867, Susan B. Palmer (widow) purchased real estate in the city of Cincinnati, and at the time of her marriage to Samuel Mills, in 1868, she still owned this property. On June 6, 1870, Susan B. Mills, by deed, sold one parcel of said property to John Carlisle, trustee of Fannie C. Mendenhall, consideration \$20,500. On September 2, 1872, Susan B. Mills, by deed, conveyed to Victor Burnham the second parcel, consideration \$6,000. It thus appears that Susan B. Mills owned a separate estate, and the evidence further shows, beyond any reasonable question, that within two or three years after her marriage the husband became possessed of the proceeds realized from the sale of the wife's property; that he handled all her money and securities; that he made investments, with her apparent consent, in his own name. No part of the principal seems to have been lost or consumed. The husband never rendered the wife any account, and he never paid the principal back to his wife. While he was handling the money, it is claimed by plaintiff's witnesses that Samuel Mills admitted, on certain occasions, that he had money of his wife's to invest, and also stated that "We don't intend to use one dollar of the principal. We are going to live up to the interest; not one dollar of the principal." Mary F. Reid, record page 7.

The evidence further shows that Samuel Mills died, leaving an estate somewhat in excess of this claim. He left a will (exhibit A), by the terms of which he provided for the payment of all debts, and provided for his wife in lieu of her dower. In substance, he provided that his widow should receive, from the income of his property, \$75 a month during her life, with the right to occupy the rooms of their present residence until the expiration of the lease on the house, in 1900, and then to occupy the same from the expiration of said lease during her life, or in case the house should not be tenantable, that other suitable premises should be provided for his executrix, "so that she shall not

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want for anything. And my executrix is directed to appropriate and use such further sums as may be necessary, out of the estate, for her comfort and welfare; and this devise shall be in lieu of her dower in my property."

The will then provides that any portion of the devise not so expended shall be governed by clause 3. Clause 3 is as follows:

"I give and devise to my beloved daughter Ella all the rest and residue of my property, real and personal, to her, her heirs and assigns forever, subject only to the provisions of the following clause in the will."

Then follows a provision that, in case Ella A. should predecease him, \$20,000 is bequeathed to the son-in-law, and the residue to certain of his and his wife's relatives. Samuel Mills, as stated, died November 24, 1897, and Ella Miller was appointed executrix. On January 10, 1898, Susan B. Mills, then a paralytic over eighty years of age, elected to take under the will. Ten days thereafter she died, and among her effects was found a will which had been executed by her two years before her marriage to Mr. Mills, but which had never been canceled nor revoked. Plaintiff herein was appointed administrator of the estate of Susan B. Mills, with the will annexed. On December 7, 1898, he presented a written statement of his claim amounting to \$26,500 in favor of the estate of Susan B. Mills, against the estate of Samuel Mills. The claim was rejected by the executrix of Samuel Mills. Accordingly suit was brought August 12, 1899, for said sum with interest from September 6, 1872, for money had and received by said Samuel Mills for the use of Susan B. Mills.

This contest, therefore, is between the blood relatives and beneficiaries of Susan Palmer Mills on the one hand, and Ella Miller, a step-daughter, on the other. Several defenses to plaintiff's claim have been interposed. First, it was claimed the husband never received the property of Susan Palmer Mills. Then it was urged that, if he did receive it, there was a presumption of payment arising from lapse of time. The statute of limitations was also pleaded, as was laches, estoppel and the election of the widow, Susan Palmer Mills, to take under the will of her husband. All these matters were urged in bar of the claim. But the real defense, although seemingly inconsistent with the general denial, was, that the wife, during her lifetime, had made a gift of this property to her husband. Upon this proposition the case turns upon a rule of evidence, the proper placing of the burden of proof, and likewise the quantum of evidence necessary to sustain it.

The defense that the husband never came into possession of the property seemed to have been practically abandoned early in the case, and defendant contended that the married woman's acts, in force at the time the husband acquired possession of the wife's property, the

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Key act, of 1861 (58 O. L. 54, 55; see Rev. Stat. 3108; Lan. 4908), and its modification in 1871 (68 O. L. 48, amending paragraph 2 of the act of 1861) had the effect of making Mrs. Mills a *feme sole* with reference to her separate property, and that she could do with it as she pleased, give it to anybody she pleased, with her assent in the one case (the Sixth street property), and her express assent in the other (the George street property). And that, as it appears she did assent to her husband's getting possession, the law, because of the great lapse of years, the wife's conduct and the inferences to be builded thereon, would imply an assent to ownership. In other words, a gift would be presumed, and the burden would be on the wife, or those claiming under her, to negative a gift.

The claim of plaintiff, however, is diametrically opposed to this contention, and it is urged that where the husband acquired possession of the wife's separate estate, as did Samuel Mills, the law, in the absence of direct evidence to the contrary, would presume that this possession was as agent or trustee for the wife, or that it was a loan, and that neither his possession nor the wife's assumed assent, nor her silence even up to his death, singly or collectively, suggests a circumstance from which the law will permit an inference of a transmission of title to be drawn in favor of the husband's estate. On the contrary, it is claimed the law will presume that the wife was and intended to remain his creditor.

Let us first consider the meaning and effect of the statutes involved. The purpose of the remedial or enabling statutes, it seems, was to furnish a shield to a *feme covert*—to give her a separate estate; without the statutes she would still have had a general estate. When, then, it is evident that she has a separate estate, the mere physical possession of it by the husband, whether with or without her consent, express or implied, is not to be asserted to her prejudice, unless it appears the assent or the express assent was an assent to his becoming the absolute owner of the estate. In other words, it is recognized by all the authorities that the technical words "reduction to possession" as used in the statutes do not refer to the mere physical possession alone. Such words are held to mean that the title or ownership must be transmitted, as well as the mere possession of the thing. Thus it is seen, at common law, a husband might take possession without reducing to possession. *Sessions v. Trevitt*, 39 Ohio St. 259, 266, 267; *Pierson v. Smith*, 9 Ohio St. 554, 558 [75 Am. Dec. 486]; see last paragraph in 15 Am. & Eng. Enc. Law (2 ed.) 826, notes 9 to 12, 827, notes 1 to 3.

And he might effect a reduction to possession without the assent of the wife. Under enabling statutes such as ours, the husband could still, with the wife's assent, take possession without reducing to possession. The "reduction to possession" (ownership), however, cannot be made

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without her assent (1861), or express assent (1871). The acts of 1861 and 1871 deal with this reduction to possession. They provide that, with the wife's assent in the one case, or her express assent in the other, the title, as well as the possession, may be transmitted. If the statute were to be otherwise translated, and from mere physical possession coupled with inferences arising from lapse of time, the wife's silence or conduct might take the place of proof that the husband's possession was as absolute owner, and that a transmission of title had taken place; a practical nullification of the statutes would thus be effected.

The courts, however, understanding that such statutes were for the protection of married women, and recognizing that possession by the husband may as well be in the capacity of agent or trustee as that of owner, place the burden on the husband to prove not only possession with assent but reduction to possession; that is, assent to his absolute ownership as well. Regardless, then, of the wording of particular enabling statutes of any state,—and this is shown by the uniformity of decision notwithstanding varying language of the statutes of the different states,—the general policy of the law has been, with reference to the wife's separate property in the possession of the husband, to raise a presumption that he held it as agent or trustee,—not as owner. And rather than infer a gift, the law presumes just the contrary, with this recognized difference, however, that where the husband is in receipt of an income, as contradistinguished from a use of the capital (and in the case at bar the husband had the capital) then the onus is on the wife to prove that her husband received the income by way of loan, and not as a gift. Standard text writers and the overwhelming weight of English and American authority announce this to be the rule. No pretense is here made to refer to all the authorities. A few will suffice. An exposition of the English rule is had in *Lush, Husband & Wife* (2 ed.) 196, 197:

“The result of the authorities to the present time appears to be, that in the case of the receipt of the capital of the wife's separate property by her husband, the onus of proof of a gift by the wife to the husband lies upon him and must be clearly established, or else the husband will be held to be a trustee for the wife. In the case of the receipt by the husband of the income of the wife's separate property, the onus lies on the wife, save perhaps as to the last year's income, and she must establish clearly and conclusively that her husband received her income by way of a loan.”

As long ago as 1792, Lord Macclesfield declared that—

“Where a married woman held a separate estate and her husband got possession of any part of its principal, he was bound to account to her for it; but that where she permitted him to receive the income of

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her estate and to use it, without making the least objection to him, or to the debtor who paid the money, or to her trustees, it should be presumed that she consented that he should use the money as his own." *Powell v. Hanke*, 2 P. Wms. 82; *Denny v. Denny*, 123 Ind. 240, 244 [23 N. E. Rep. 519]; *Jones v. Davenport*, 44 N. J. Eq. 33 [13 Atl. Rep. 652].

In *Rowe v. Rowe*, 2 DeG. & Sm. 294, it was said:

"A husband, with his wife's concurrence, received a legacy bequeathed upon trust for her separate use. Some time afterwards he made his will, bequeathing to her a much larger sum, and directing his executor, who was also his residuary legatee, to pay all his just debts. *Held*, first, that the concurrence of the wife in the receipt of the legacy by the husband was not a gift of it to him; secondly, that the bequest by the husband to the wife was not a satisfaction of the wife's claim against his estate in respect of the first-mentioned legacy."

See also *Woodward v. Woodward*, 3 DeG. J. & S. 672; *Blake, In re*, 60 Law. Rep. (Law Times) 663, 664, where English cases to date of decision (1899) are collated; 1 Perry, Trusts (5 ed.) Sec. 127, pages 166, 167, 163, second column of notes to Sec. 126; 2 Perry, Trusts (5 ed.) Sec. 666; Harris, Contracts of Married Women Sec. 576; *Stickney v. Stickney*, 131 U. S. 227 [9 Sup. Ct. Rep. 677; 33 L. Ed. 136], syllabi 2 and 3, and pages 238, 239 of opinion; *Garner v. Bank*, 151 U. S. 420, 433 [14 Sup. Ct. Rep. 390; 38 L. Ed. 218]; *Neiman, In re*, 109 Fed. Rep. 113; *Brown v. Daugherty*, 120 Fed. Rep. 526, 528; *Patten v. Patten*, 75 Ill. 446, cited in *Heckman v. Adams*, 50 Ohio St. 305, 311 [34 N. E. Rep. 155]; *Adoue v. Spencer*, 56 L. R. A. 817 [62 N. J. Eq. 782; 49 Atl. Rep. 10; 90 Am. St. Rep. 484].

At page 820 the annotator says:

"Under the various married women's acts securing the separate estate of married women to them, with the exception noted, *infra*, II c. 2," (as to income and profits), "the receipt of the money or property of a wife by her husband is presumed to be for her use, and the burden is cast upon him to remove such presumption by evidence establishing a gift or purchase, or that it has been expended or used in a mode or for a purpose authorized by her."

At page 845 *ib.* the writer says:

"Under the various married women's acts, however, a different rule obtains. By them a wife's property rights are preserved as against her husband, and the receipt by the husband of his wife's property is presumed to be for her use, and the burden rests with him to rebut such presumption and establish a gift to him or a purchase by him; and to establish this he must prove assent on the part of the wife, not only to possession on his part, but also to his absolute ownership."

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See also *Leeds, In re*, 49 La. Ann. 501 [21 So. Rep. 617], wherein it was said:

"It is elementary that the mere acceptance and personal use or investment, in his own name, of the wife's funds creates indebtedness in her favor and against the husband."

And in *Turner v. Guttwals*, 15 Dist. of Col. App. Cas. 43, Chief Justice Alvey said:

"Where the wife makes a claim against the estate of her husband, and no creditors of the latter are concerned, quite a modified principle applies for the protection of the wife as against the husband or his estate. In such case the receipt and use of the money belonging to the wife by the husband gives rise to a *prima facie* presumption that the husband was acting as agent or trustee to the wife, and he or his estate will be accountable. This is established by the case of *Stickney v. Stickney*, 131 U. S. 227, 240. Also founded on the construction of the married woman's act of April 10, 1869."

Similar rulings will be found in a great many American jurisdictions. Some few cases hold to the contrary.

The case of *Pawlet v. Delavel*, 2 Ves. Sr. 662, relied on by counsel for defendant, is, however, not authority to the contrary. That was an early case holding that a wife can make a gift to her husband, and the generalities indulged in in the opinion are subsequently criticised in 3 Ves. Sr. Belt's Supp. *437, *459.

Other cases cited by defendant are cases which relate to "income" (for distinction see *Lush, Husband & Wife, supra*), or have to do with the rights of third parties, *e. g.*, creditors, and the position as contended for by defendant and as announced in the early case of *Black v. Black*, 30 N. J. Eq. 215, I find is not the doctrine of that state. The later New Jersey doctrine is found in *Adoue v. Spencer, supra*, and *Brady v. Brady*, 58 Atl. Rep. 931 (N. J.).

In short, then, the statutes of 1861 and 1871 are to be read with the view of ascertaining whether they had the effect of creating a wife's separate property. If so, and the husband secured the possession, then the burden would be on him to establish the wife's assent to his ownership. If such was not the effect of the statutes of 1861 and 1871, then the legislature did a vain thing in enacting them, and, by a rule of evidence, the husband would be enabled to accomplish, notwithstanding the statutes, that which he had plenary power to do before their enactment, under the common law. Instead of enlarging the married woman's rights, she was left where she stood prior to the passage of those statutes. Placing the burden on the husband, however, gives vitality to the statutes and affords married women the protection no doubt contemplated by the lawmaking power.

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Is the claim barred by the statute of limitations, or by anything analogous thereto? *Yokum v. Allen*, 58 Ohio St. 280 [50 N. E. Rep. 909], and *Ham v. Kunzi*, 56 Ohio St. 531 [47 N. E. Rep. 536], seem to me to foreclose argument as to the statute of limitations. Under the facts here presented, the statute could not begin to run during coverture, and to hold that there was a presumption of payment because of lapse of time, or that the wife's silence and conduct during all the years of the husband's possession constituted laches and that she intended a gift, or is estopped because of her failure to exercise her rights during coverture, would be to override the statute of limitations and thus permit, by indirection, what may not be done directly.

In *Franc v. Nirdlinger*, 41 Ohio St. 298, a different rule might be indicated. That, however, was a case involving the rights of third parties, and there is no question as to presumptions of payment between husband and wife decided. In my judgment, it is inapplicable to facts such as are presented by the record before me. *Moeckel v. Heim*, 46 Mo. App. 340, which refers to *Franc v. Nirdlinger*, *supra*, and *Stone v. Bank*, 81 Mo. App. 9, are cases that show that *Franc v. Nirdlinger*, *supra*, however applicable when rights of third parties are involved, is not applicable when the question arises as between husband and wife.

In *Newton v. Taylor*, 32 Ohio St. 399, the courts say, at page 414:

"It will not do to say that as soon as the wife obtained the loan, and handed it over to him" (the husband), "from that moment it became his personal property, by virtue of his marital rights."

And again, at page 415:

"We do not think that lapse of time should bar Mrs. Taylor from asserting her rights. She did so shortly after her husband's death. She was not bound to do so before, at the risk of creating trouble in her family."

In *Second Nat. Bank v. Merrill*, 81 Wis. 151 [50 N. W. Rep. 505; 29 Am. St. Rep. 877], the courts say:

"The statute of limitations does not run against a wife, and presumption of payment by lapse of time does not prevail against her. She ought not to be compelled to treat her husband as a stranger. Any other policy would beget disagreement and distrust."

In *Barnett v. Harshbarger*, 105 Ind. 410 [5 N. E. Rep. 718], it is said, at page 415:

"It is not for the good of the world that a wife should be compelled to distrust her husband, and deal with him as she would a stranger, in order that she may not have her rights swept away by the lapse of time."

In *Fawcett v. Fawcett*, 85 Wis. 332, 336 [55 N. W. Rep. 405; 39 Am. St. Rep. 844], it is said:

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"It is now thoroughly well settled, by authorities too uniform to require citation, and too numerous to cite here, that as between a trustee of an express trust, cognizable only in a court of equity, and his *cestui que trust*, concerning matters connected with the trust relation, no statute of limitation, nor any bar by analogy thereto, can be relied upon to defeat the execution of the trust, unless the full period of limitation has elapsed since the denial or repudiation by the trustee of the trust obligation."

In *Paschall v. Hinderer*, 28 Ohio St. 568, 580, the court say:

"He nowhere claims that his possession was openly and avowedly in repudiation of his trust relation to the property. Until he does so, the occupancy will be presumed to be in fulfillment of the trust, and not in derogation of it."

And near the bottom of the same page:

"What constitutes a stale equity is a vexed question hardly susceptible of accurate definition. Length of time alone is not a test of staleness."

See, also, *Rucker v. Maddox*, 114 Ga. 899 [41 S. E. Rep. 68]; *Teasley v. Bradley*, 110 Ga. 497 [35 S. E. Rep. 782; 78 Am. St. Rep. 113]; 22 Am. & Eng. Enc. Law (2 ed.) 1243, notes 2 and 3.

It is assumed, in the case at bar, that the wife assented to the husband's possession. Such being the case, it is presumed, in law, that it was possession in a trust capacity, and this capacity continues until the contrary appears; and the authorities cited show that neither the statute of limitations, nor anything analogous thereto, can prejudice the wife's position.

Did the wife's election to take under her husband's will bar plaintiff's claim? I think this question also must be answered in the negative. It will be remembered that the will of Samuel Mills provided for the payment of debts, and then made provision in lieu of dower in his property. The will was certainly not ambiguous, nor was there any room for construction. It is plain on its face. The election of the widow was to take the benefit of clause 2 rather than her dower interest in his estate. The wife did not elect as creditor, but as widow, and there was nothing on the face of the will "to indicate the unmistakable intention of Samuel Mills to dispose of property" belonging to his wife. Her election, then, could not have referred, in any way, to her property. And consequently her election as widow was not incompatible with her claim as creditor, and it could not prejudice her rights as such. Since the will does not, on its face, clearly and unmistakably show that the testator was undertaking to dispose of the property of Mrs. Mills, it would make no difference what Mrs. Mills may have said at the time of her election, nor would any extraneous fact be permitted to alter the record of the election. The record speaks as to what her

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election was, and her rights were fixed. As stated, under the law, she must be held to have elected to take the provisions of clause 2 instead of her one-third interest or dower. To hold otherwise would be, in effect, to undertake to make a new will for Samuel Mills. For when he said that he desired his debts to be paid, to quote the language of Judge McIlvaine, in *Bowen v. Bowen*, 34 Ohio St. 164,

"It would indeed be hazardous to say that the testator, when he gave this direction, did not intend to include the debt of his wife, which was, by far, the largest outstanding and undisputed debt against him or his estate."

In 1 Underhill, Wills Sec. 451, it is said:

"The same rules and principles are applicable to a legacy given by a husband to a wife to whom, at the date of the execution of the will, he is indebted. A provision in the will attached to a gift of real or personal property to the widow of the testator, that it is in lieu of dower and of all other claims against, or interest in, the estate of the testator, will not be sufficient to constitute the gift a satisfaction of a debt which, at the date of the will, is due from the testator to his wife, particularly where the will also directs that the debts of the testator shall be paid and makes provision for that purpose."

In *Denny v. Denny*, *supra*, the court makes clear the language that is necessary to be employed where one undertakes to dispose of property other than his own, to call for an election. See also *Konvalinka v. Schlegel*, 104 N. Y. 125 [9 N. E. Rep. 868; 58 Am. Rep. 494]; *Taylor v. Taylor*, 4 Jur. (N. S.) 1218; *Russell v. Mintun*, 42 N. J. Eq. 123 [7 Atl. Rep. 342]. And in *Charch v. Charch*, 57 Ohio St. 561, 580 [49 N. E. Rep. 408], the court to my mind, lays down the rule that must govern the state of facts presented in the instant case:

"If the provision in question, taken in connection with the whole will, will reasonably admit a construction not involving a disposition of such property, that construction must prevail. In order to create the necessity for an election, there must appear upon the face of the will itself a clear, unmistakable intention on the part of the testator to dispose of property which is in fact not his own. The language must be so clear as to leave no doubt as to the testator's design."

See also *Rucker v. Maddox*, 114 Ga. 899 [41 S. E. Rep. 68]; 11 Am. & Eng. Enc. of Law (2 ed.) 65, 68, and cases under note 3, page 68; *Owsley v. Price*, 26 O. C. C. 260, wherein *Hibbs v. Insurance Co.* 40 Ohio St. 543, relied on by the defendant herein is distinguished and *Charch v. Charch*, *supra*, is followed.

There remains but one question:

Has the husband, or defendant herein, who stands in his place, sustained the burden? Has assent to ownership been proven by direct evidence? What amount of evidence is required? Will a mere pre-

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ponderance suffice, or must the evidence to establish the gift be clear and convincing?

Even if the mere preponderance would be sufficient to establish a gift *inter vivos*, I cannot say that that preponderance lies with the defendant. Since the wife was not bound to speak "at the risk of creating trouble in her family" (*Newton v. Taylor, supra*), her silence throughout all these years could not be construed against her. And while she may have assented to possession, nothing may be inferred from that as an assent to ownership. An assent to ownership may not be implied from mere silence. She was not compelled to demand her property, and although she did many things that unquestionably show assent to the husband's possession, I do not think it can be said that there is anything to indicate her intention to let her husband become absolutely possessed of the title.

On the other hand, we have the admissions of Samuel Mills, after he acquired possession, that he had money of his wife's to invest, and also that it was intended to live up to the interest, and not the principal. Even if these admissions are to be accorded but little weight, because of the interestedness of the witnesses, the lapse of time, the fact that they may have referred to other property, although it does not appear that the wife had any other property, what is there to indicate assent on the part of the wife to ownership in the husband? The statements made during Mr. Mills's lifetime by Mrs. Mills herself that "Everything I have is pa's" or "Everything I have is Ella's," might well be taken to mean assent to a mere possession, and are not sufficiently definite to indicate transmission of title to either one. Such language may also be taken to refer to a loan. As illustrating the use of the phrase, "Everything is pa's" or "Everything is Ella's," we may take the evidence of Charlotte G. Miller, record page 16, "I know when her daughter, Mrs. John Miller (Ella), was using some of her things or wearing some of her clothes, Mrs. John Miller would say 'This is ma's,' and she would say 'No, everything I have is Ella's.' " Could such language fairly be construed to imply "fixed intention by the donor irrevocably to divest herself of dominion or control of the subject-matter at that very time?" *Allen West Commission Co. v. Grumbles*, 129 Fed. Rep. 287. See also *Bolin, In re*, 136 N. Y. 177, 180 [32 N. E. Rep. 626].

And yet such are the elements that are necessarily the test of a gift. The same test is to be applied to other alleged declarations of Mrs. Mills. For example, when she said, "There are not two pocket-books in this family; we have only one, and that is pa's," such statement might well be taken to indicate a joint ownership; and when Mrs. Mills stated "I am glad I have nothing to bother me that way"—referring to houses to rent—the language might just as well be taken to

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mean that she was glad she didn't have to bother in managing property, as to say that it was a declaration that she had absolutely no interest, title or ownership in any property.

For construction placed on similar declarations and phrases where it was claimed they amounted to language necessary to establish a gift, and were held insufficient, see *Thompson v. Lynch*, 29 Cal. 189, 191, 192; *White v. Warren*, 120 Cal. 332 [49 Pac. Rep. 129; 52 Pac. Rep. 723].

In other words, these alleged declarations cannot be held to have established her intention to deprive herself, irrevocably, of authority or ownership of the property in question. See *Burns v. Burns*, 132 Mich. 441 [93 N. W. Rep. 1077]; *Dresser v. Zabriskie*, 39 Atl. Rep. 1066; *Thompson v. West*, 56 N. J. Eq. 660, 664 [40 Atl. Rep. 197].

The defendant, however, contends that to prove a gift *inter vivos* the evidence should be clear and convincing, and reliance is had on *Flanders v. Blandy*, 45 Ohio St. 108 [12 N. E. Rep. 321]. If such rule is to be applied, then certainly the burden of proof is not sustained.

I am free to say that I have not reached the conclusion in this case without some reluctance. The evidence shows that the relations of Mrs. Mills and her stepdaughter and husband, throughout all the years, were cordial. And yet I cannot say that the same was not true with reference to those who now claim as her beneficiaries. To hold other than I have would mean arbitrarily, or through sympathy, to nullify a will solemnly and deliberately made and executed and which Mrs. Mills, a very intelligent woman, not only never destroyed nor revoked, but seems to have preserved through all these years. Holding as I do, I am compelled to give effect to a will which, despite the pleasant relations between Mrs. Mills and her stepdaughter, takes no notice of the stepdaughter; necessarily so, as it was executed probably before Mrs. Mills thought of her marriage to Mr. Mills. Unless it shall be determined that *Franc v. Nirdlinger*, *supra*, is in point, and *Yokum v. Allen*, *supra*, shall be held not applicable; that the wife was compelled to speak, or her silence or conduct or the fragmentary declarations made by her shall be held to be sufficient to establish a gift *inter vivos*,—sufficient to prove assent to ownership divesting Mrs. Mills absolutely and irrevocably of all interest and title to the property in question,—judicial subordination is such that I feel no other course is open, and I must enter judgment for plaintiff for \$26,500 with interest from the death of Mr. Mills, November 24, 1897; and it is so ordered.

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CONSPIRACY—INDICTMENT—MONOPOLIES.

[Franklin Common Pleas. November 30, 1906.]

STATE OF OHIO V. CRYSTAL ICE MFG. & COLD STORAGE CO.**1. SUFFICIENCY OF ALLEGATION OF DATE OF FORMATION IN INDICTMENT AGAINST A TRUST.**

It is not essential to an indictment for forming a combination in restraint of trade, under the Valentine antitrust law, that it should state the exact date, with certainty, upon which the combination was effected, and such an indictment is not bad for indefiniteness or uncertainty when it charges the defendants with having met on or about February 1, 1905, and at divers times between that date and June, 1906, met for the purpose of forming such a combination.

2. FORMATION OF TRUST AS A SEPARATE OFFENSE.

It is not an essential to the offense of forming a monopoly that the conspiracy should include the particular means to be used to attain the end sought, and an indictment alleging that one of the purposes of an alleged monopoly was increasing the price of ice, is not indefinite in that it does not state how this is to be done.

[For other cases in point, see 6 Cyc. Dig., "Monopolies," §§ 28-36.—Ed.]

3. EFFECT OF DESCRIBING ACCUSED AS DEFENDANT.

The fact that the persons named in an indictment are afterwards, described as defendants does not vitiate the indictment, as being indefinite and uncertain.

[For other cases in point, see 5 Cyc. Dig., "Indictment and Information," §§ 161-200.—Ed.]

4. WHAT IS UNLAWFUL COMBINATION.

Under the antitrust law, Lan. 7586 *et seq.* (B. 4427-1 *et seq.*), it is an offense to form a combination for any of the purposes specified in the above statutes, independent of any overt act.

[For other cases in point, see 6 Cyc. Dig., "Monopolies," §§ 28-41.—Ed.]

[Syllabus approved by the court.]

MOTIONS to quash indictment.

K. T. Webber, prosecuting attorney, for plaintiff.

Booth, Keating & Peters, for defendants.

BIGGER, J.

Motions to quash the indictment have been filed by the several defendants. It is objected that the indictment is so indefinite and uncertain as that the exact nature and cause of the accusation against the defendants is not apparent and does not appear from the indictment; and that it is so indefinite on account of the surplusage contained therein, that the defendants are not advised of the exact nature of the accusation made against them.

The indictment contains but one count. It charges that the defendants, naming them, and describing them as defendants, on or about February 1, 1905, and at divers other times between the said February 1, 1905, and June 1, 1906, the particular date being to the grand jury unknown, did meet and come together at the said county of Franklin,

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in the state of Ohio, for the purpose and with the intent of inducing each and all of said defendants to engage in and take part in the conspiracy against trade hereinafter set forth; that on or about February 1, 1906, the particular date to the grand jury unknown, the said defendants, at the said county of Franklin, in the state of Ohio, unlawfully did combine their skill and acts for the purposes following, to wit: To increase the price of a certain commodity, to wit, ice, to the purchasers and to the customers in the city of Columbus, and in said Franklin county, to prevent competition in the sale of a certain commodity, to wit, ice, among themselves and others, in the city of Columbus, and in said county of Franklin, to fix at a certain common standard figure, the price of a certain commodity, to wit, ice, to the purchasers and consumers thereof, whereby the price of said commodity, to wit, ice, should be established in the city of Columbus and in said county of Franklin, and be controlled by said combination, and the indictment concludes as follows:

"And so the jurors of the grand jury aforesaid, upon their oaths as aforesaid, do say that the defendants, and each of them, at the county of Franklin aforesaid, on or about the first day of February, 1906, the particular date being to the grand jury unknown as aforesaid, by so unlawfully combining their skill and acts as aforesaid, for the purposes aforesaid, did engage in and take part in a conspiracy against trade, contrary to the statute in such cases made and provided and against the peace and dignity of the state of Ohio."

This conclusion of the grand jury adds nothing to the statement of facts contained in the indictment, but is only the conclusion of the grand jury from the matters found and stated by the grand jurors in the indictment, and may therefore be disregarded, upon the consideration of the question of the sufficiency of the matters stated in the indictment as constituting an offense under the statute.

Is this indictment so indefinite and uncertain as that it does not advise the defendants clearly of the offense charged against them, or does it contain so much surplusage as to obscure the real charge? The charge is, that these various persons natural and artificial, on or about February 1, 1906, did combine their skill and acts for the specific purpose named in the indictment and which are declared by the statute to constitute a trust and to be a conspiracy against trade. Time is not of the essence of this offense unless by virtue of Lan. 7586 (B. 4427-4), which makes each day's violation of the provisions of the statute a separate offense.

It is stated in this indictment that upon a particular day, the exact date not being known to the grand jurors, but about February 1, 1906, this combination was entered into. It is certainly not essential to such

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an indictment that the grand jurors must be able to state the exact date with certainty upon which this combination was effected. They state the exact date is to them unknown. Neither do I see how the indictment is indefinite because it is stated that the persons named did meet upon certain other dates for the purpose of inducing each and all of them to engage in the conspiracy described in the indictment. It would certainly not make an indictment for murder in the first degree indefinite or uncertain, if it were to allege that the defendant had deliberated upon the commission of the crime upon certain days preceding its commission. It is sufficient to state that it was deliberated upon, and it would not have the effect to render it indefinite if it were averred that the defendant had deliberated at divers times previous to the commission of the crime. It is objected that this indictment charges that they met for this purpose up to June 1, 1906, or for a period of four months after it is alleged the illegal combination was formed. It is certainly manifest that persons could not meet together to induce each other to do something after they had done it. Upon trial such evidence would not be competent. But it is only surplusage and cannot make the charge indefinite. It would certainly be competent, as a matter of evidence, to show that at certain times, previous to the time when it is alleged they entered into this combination, these individuals had met together for the purpose of inducing each other to enter into it.

It would not be conclusive evidence, doubtless, that such combination was entered into, but it would certainly be competent evidence, tending to show it, as disclosing a disposition and desire to do so, which with other evidence, might be sufficient to warrant a jury in finding that it was entered into. I am unable to see how any indefiniteness can arise by reason of this averment.

It is said it is indefinite because, while it charges that one of the purposes of the combination was to increase the price of ice, it does not state how this was to be done, but it is not essential, as I view it, to the statement of an offense, that the conspiracy should have included the particular means to be used to that end. That may have been left for future determination. But if the purpose of the combination was to do this, it is made unlawful without regard to the particular means to be employed. The same may be said as to the charge that one of the purposes was to prevent competition. The particular means to that end may not have been determined upon but a combination for that purpose is made unlawful. But it is objected that the indictment is indefinite because it charges that the purpose was to prevent competition between themselves and others, without naming the others. Here again it would not be essential in my judgment to the statement of an offense to charge the names of the other persons, for, *non constat*, but that the others, who might be competitors, were unknown even to those charged with

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being members of the conspiracy. The term is in my opinion, sufficiently comprehensive in itself to include all others engaged in the same business.

The gist of this offense is not the particular act done under the conspiracy, but the formation of the conspiracy, and I think it is sufficiently descriptive in its purposes to advise the defendants of what they are to meet. The offense under the statute is the unlawful combination of skill and acts for this purpose. The particular means to be employed to accomplish the unlawful purposes may not have been agreed upon and are not in my opinion essential to the statement of an offense under the statute. The gist of the offense is the formation of a combination for such purpose. It is the purpose which is made unlawful and the means used to that end are immaterial and may be one thing at one date, and another at another and still be but the carrying out of a single unlawful purpose of combination.

It is also objected that the persons named in the indictment are described as defendants. It is probably true that the term is not technically correct, but does it result in any indefiniteness? After the persons are named in the indictment, their names are followed by this statement "each and all defendants herein," and they are afterwards referred to as "said defendants." I do not see how any indefiniteness results from this. The said defendants, after they are described as each and all defendants, certainly include all that are named and so described.

It is further objected that the indictment is bad for duplicity. I think this indictment does not charge more than one offense. The offense charged here is the formation of a trust and not its continuance, and it is alleged to have been formed upon a date not known exactly to the grand jurors, but stated to have been about February 1, 1906. This offense is unlike the indictment recently held to be bad upon motion and demurrer, which in a second count alleged, with a continuendo, the carrying out of the illegal purposes by the combination. I did state it as my opinion, in deciding these motions and demurrers, that this would probably not render an indictment subject to the charge of duplicity. Whether that opinion be correct or not, I think this indictment is not open to that objection, as it does not state the carrying out of the illegal purposes of the combination, between certain dates or its continuance for any length of time, but only the single offense of the formation of an illegal combination upon a date, stated to be about February 1. The carrying out of the purposes of such an illegal combination is made a separate offense under the statute, but this indictment does not charge that the conspiracy was carried out. It is said that there is no statement of any overt act on the part of the defendants in the carrying out of the illegal purposes of the combination. In my judgment this statute

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makes it an offense to form such a combination for the purposes stated, independent of any overt acts. At common law, no overt act was essential to the offense of conspiracy.

As was said by Lyon, Judge, in the case of *State v. Crowley*, 41 Wis. 271, 277 [22 Am. Rep. 719]:

"The offense of conspiracy, in one respect, is doubtless peculiar. It may, unlike most offenses, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons, may, by such assent and agreement, ripen into a crime, although no act be done in pursuance of it."

By the terms of this statute the formation of a trust or conspiracy against trade is made penal, although its purposes are not carried out. This is plain from the language of the statute. A combination, whose purpose is to do the things forbidden in the future, is denounced by the statute. It is made an offense to enter such a combination, to make or enter into, or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall combine or have combined themselves, not to sell, etc. The carrying out of the unlawful purposes stated in the statute is made a separate offense by the terms of Lan. 7589 (B. 4427-4).

It is objected that the capacity in which the defendants are charged with taking part, is not stated. It is true that Lan. 7589 (B. 4427-4) makes it an offense to carry out the purposes of such illegal combination, whether the person so doing acts as principal, manager, director, agent, servant or employer, or in any other capacity; but I do not think this would make it necessary to state in an indictment in what capacity he acted; if he was personally charged with offending against the statute, and it should appear that he acted in either of these capacities, he would be liable to the penalties of the statute.

This provision of Lan. 7589 (B. 4427-4), it is also to be observed, relates only to the carrying out of the purpose of the combination, and these defendants are not charged with carrying out of the purpose of the combination.

The objections which are pointed out to this indictment do not seem to me to be valid objections and the motions are overruled.

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ATTACHMENT AND GARNISHMENT.

[Hamilton Common Pleas, February 14, 1907.]

MARGARET MCCARTNEY v. ED. H. WILLIAMS.

1. EFFECT OF REDELIVERY BOND IN ATTACHMENT.

A debtor has the right under Rev. Stat. 6494 (Lan. 10071), of the magistrates' code and under Rev. Stat. 5529 (Lan. 9058) of the civil code to deny the truth of the grounds of attachment, or to contest the attachment after giving a redelivery bond as therein provided.

[For other cases in point, see 1 Cyc. Dig., "Attachment and Garnishment," §§ 454-466.—Ed.]

2. EFFECT OF BAIL BOND AS RELEASING ATTACHMENT.

But a debtor has not the right, after giving a bail bond to release the attachment and agreeing to perform the judgment on the merits, as provided under Rev. Stat. 6513 (Lan. 10090) or under Rev. Stat. 5545 (Lan. 9074), to thereafter question the attachment in any manner, because all the proceedings thereunder have been superseded by such undertaking.

[Syllabus approved by the court.]

APPEAL from justice of the peace.

J. A. Deasy, for plaintiff.

E. H. Williams and J. H. McMakin, for defendant.

PFLEGER, J.

This proceeding was an appeal from an order of a magistrate overruling the motion of the defendant to discharge an attachment. The plaintiff objected to the introduction of any evidence and moved to dismiss the appeal because the defendant in place of giving a redelivery bond under Rev. Stat. 6494 (Lan. 10071), executed a discharge bond to perform the judgment under Rev. Stat. 6513 (Lan. 10090). This bond it is claimed vacated the entire proceedings in attachment and left nothing from which an appeal could be taken. These sections appear to have had no previous construction by the courts, and was submitted upon the mere language of the statute. A diversity of opinion exists on the construction given the same language in the civil code governing proceedings in this court.

Revised Statute 6494 (Lan. 10071), of the magistrates' code, is exactly similar to Rev. Stat. 5529 (Lan. 9058) relating to proceedings in the upper court, and provides for a redelivery of the attached property to the person in whose possession it was found upon the execution of a bond to the effect "that the parties to the same are bound, in double the appraised value of the property, that the property, or the appraised value in money, shall be forthcoming to answer the judgment of the court in the action."

Revised Statute 6513 (Lan. 10090) of the magistrates' code is similar to Rev. Stat. 5545 (Lan. 9074) of the statute governing actions in

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the court of common pleas, both of which sections are referred to by the codifiers as the method for "discharging the attachment," and provide that if the defendant at any time before judgment execute a bond in double the amount of the plaintiff's claim, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged.

The interpretations given to the latter section, applicable to proceedings in this court, will therefore be not only in point, but decisive of similar sections in the magistrates' code.

In *Meyers v. Smith*, 29 Ohio St. 120, it was held that the undertaking under Rev. Stat. 5545 (Lan. 9074) superseded all the proceedings under the attachment. The earliest case to the contrary is that of *Egan v. Lumsden*, 13 Dec. Re. 103 (2 Disn. 168), in which Judge Storer held that the execution of a bond to perform the judgment given by a non-resident defendant did not enter his appearance nor did it preclude him from contesting the creditor's right to the attachment; that the legislature intended to furnish the debtor with a means to prevent great loss to his property by giving such an undertaking, arguing that if this were not so, the resort to an unlawful attachment could never be challenged. Then follow quotations from two New York cases.

Nothing is mentioned of the right of the debtor to give a forthcoming bond, which should have solved the doubt in the mind of the court regarding a sufficient remedy for releasing the attached property and of contesting the attachment.

The next case giving a like construction is that of *Saxton v. Plymire*, 2 Circ. Dec. 118 (3 R. 209), decided by Judge Shauck while on the second circuit, citing the same New York cases and following the same argument. *Meyers v. Smith*, *supra*, is cited as favoring rather than repelling the contention that the defendant may nevertheless object to the validity of the attachment proceedings after giving the bail bond to perform the judgment. The reference made to the answer of the garnishees was a mere dictum. It was argued in the *Saxton* case that Rev. Stat. 5562 (Lan. 9091) gave the defendant the right at any time before judgment to move to discharge the attachment and that it in terms applied to Rev. Stat. 5529 (Lan. 9058) or to a discharge bond under Rev. Stat. 5545 (Lan. 9074). This section has reference solely to cases where the attachment has not been superseded. Upon a parity of reasoning the court might under Rev. Stat. 5556 (Lan. 9085) enforce the delivery of property against the sureties, and under Rev. Stat. 5557 (Lan. 9086), order the sheriff to repossess himself because they are equally general in their nature. These very sections have been held by the Supreme Court in *Rutledge v. Corbin*, 10 Ohio St. 478, 485, to be applicable to the undertaking under 51 O. L. 57, Sec. 199 (Rev. Stat. 529; Lan. 9058), which undertaking it was determined was "not for

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the delivery of the property, or, in default, to pay the judgment merely, but, in default of delivering the property, to pay the value thereof. The party to whom the sheriff so redelivers it, thereby receives and holds it as the bailee of the sheriff; and the property is still, in contemplation of law, in the possession of the sheriff, so far as subsequent attaching creditors are concerned."

Reference is made by Judge Shauck to *Fortman v. Rottier*, 8 Ohio St. 548 [72 Am. Dec. 606], which is also a mere dictum, and in which the construction of this section was in no way involved, and to *Alexander v. Jacoby*, 23 Ohio St. 358, in which a redelivery bond had been given, under Rev. Stat. 5529 (Lan. 9058), and the right to contest the attachment by reason thereof was recognized. The bond in the latter case was not given to discharge the attachment but as the statute states to release the property, and the right to contest the attachment was therefore not waived.

The same circuit, in *Ross v. Miller*, 3 Cire. Dec. 658 (7 R. 51), followed the decision of Judge Shauck in the case of *Saxton v. Plymire*, *supra*, without further explanation or argument.

Our court of last resort has never directly determined the point. Since the above opinions were published it has however rendered decisions emphasizing the difference between these two bonds.

In *Root v. Railway*, 45 Ohio St. 222, 228 [12 N. E. Rep. 812], it held that under Rev. Stat. 5529 (Lan. 9058) the bond was merely a "forthcoming" undertaking which took the place of the property, and which became the security of the creditor.

In *Jayne v. Platt*, 47 Ohio St. 262 [24 N. E. Rep. 262; 21 Am. St. Rep. 810], it was held that the bail-bond under Rev. Stat. 5545 (Lan. 9074), took the place of the attachment proceedings, and on page 269 the personal stipulation and liability of the sureties in the undertaking was, that the defendant shall perform the judgment of the court, which implies the judgment in the action; on page 270, "This object, as we have seen, is to enable the defendant to substitute for the attachment a security which should be available to the plaintiff upon the recovery of a judgment;" and again, on page 272, "And a fair interpretation * * * would hold the term, 'this action,' to mean the suit then pending between the parties."

In *American Cigar Co. v. Mayer*, 68 Ohio St. 623-633 [67 N. E. Rep. 1063], the court said that the condition of the obligation under this section was as the law requires "to perform the judgment of the court when the case has been heard on its merits."

If therefore the defendant who gave the undertaking to perform the judgment on the merits could thereafter successfully contest the attachment proceedings he could violate both the letter and spirit of his bond by insisting that he did not mean to perform the judgment on the

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merits, but only the judgment in the attachment proceedings, and thus rid himself of an obvious liability. There might be some room for dispute if no other provision to release the attached property had been enacted, and the interpretations given similar laws in other states supporting this right to contest the attachment upon the giving of such a bond is based upon the absence of a provision giving the debtor such permission on a forthcoming bond. Our code has given the defendant the privilege of executing this redelivery bond which took the place of the property only, and which gave the defendant right to contest all the proceedings in the ancillary proceedings in attachment. There is no ambiguity in the language of the two sections and the codifiers have properly indexed them.

The same distinction is made in 4 Cyc. 684, under the head of "Effect of the lien of attachment," by giving either a "forthcoming" bond or a bond to secure the judgment. On page 687 under the head of "Upon right to question attachment" is found the following:

"A bond for the redelivery or forthcoming of the property or which does not dissolve or discharge the attachment will not prevent defendant from moving thereafter to discharge the same. So where the bond, without judicial order to quash it, operates only to release the seizure, defendant is not precluded by such bond from moving to dismiss, and a replevy bond does not preclude defendant from traversing the truth of the grounds of attachment, or from moving to dismiss the attachment. A dissolution or discharge bond, or a bond conditioned to perform the judgment, operates to discharge the attachment altogether, rendering immaterial the validity of the grounds thereof and making the obligors unconditionally liable. The giving of such a bond is held to constitute a waiver on the part of attachment defendant of his right to move for a dissolution of the attachment thereafter, or of traversing the grounds thereof, the case standing as if no attachment had been issued."

The exceptions to the rule are as in Arkansas, where no other provision is made to obtain possession of the property. Earlier cases so holding were later distinguished in *Ferguson v. Glidewell*, 48 Ark. 195 [2 S. W. Rep. 711]; or where the bond is conditioned to pay such sum as may be found to be a lien upon the property and not to pay any judgment that may be rendered, is not a waiver of defects in the service (*Reynolds v. Marquette*, 125 Mich. 445 [84 N. W. Rep. 628]); or where the statute expressly gives the right notwithstanding the execution of such a bond as in *Winters v. Pearson*, 72 Cal. 553 [14 Pac. Rep. 304]; or as in New York, where it appeared that the statute provided that defendant might move "in all cases" for the discharge of an attachment. *Garbutt v. Hanff*, 15 Abb. Pr. 189.

The same distinction is made between a bail and redelivery bond in

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3 Am. & Eng. Enc. Law (2 ed.) 231, that the former dissolves the attachment and converts what was originally an action *in rem* into an action *in personam*, while by the latter the property is merely replevied and is still regarded as being in legal custody, the condition of the bond requiring the return of the property whenever legally demanded. By its execution no dissolution of the attachment is effected. In some states the execution of a bond to dissolve the attachment is held to operate as an estoppel upon the obligors to deny the sufficiency of the grounds of attachment or the regularity of the proceedings; while in others, the contrary is held."

Another argument might well be made as to the construction here given. Revised Statute 6494 (Lan. 10071) relating only to redelivery bonds provides that the defendant may make a motion to dissolve the attachment or release the property, which if overruled, may be appealed by him to the court of common pleas. Revised Statute 6513 (Lan. 10090) referring to bail bonds has no such provision and gives no such right of appeal.

I am not inclined, therefore, to follow the decision in the superior or the circuit court of the second district and shall only do so when our own circuit or supreme court holds. The objection to the introduction of evidence on appeal is sustained and the motion to dismiss the appeal is granted.

LIMITATION ON BOND ISSUE—MUNICIPAL CORPORATIONS.

[Mercer Common Pleas, November 17, 1906.]

*J. F. SMITH v. ROCKFORD (VIL.) ET AL.

1. RIGHT OF TAXPAYER TO ENJOIN ABUSE OF BOND ISSUING AUTHORITY.

The right of a taxpayer to bring an action to enjoin a threatened abuse of corporate power was not created by the municipal code, nor is it restricted to property owners in cities, but when occasion arises is equally available to one owning property in a village.

[For other cases in point, see "Injunction," §§ 731-804.—Ed.]

2. LIMITATION OF BOND ISSUE FOR PUBLIC IMPROVEMENT.

The limitations of Sec. 100 of the municipal code and Longworth bond act, which is in effect a part of that section, are controlling upon city and village councils in the issue of bonds to pay the corporation's share of street and sewer improvements and intersections, provided for in Sec. 53 of the municipal code; unless authorized by the electorate, therefore, such issues must be restricted for any one fiscal year to 1 per cent of the amount of taxable property within the corporation and on the tax duplicate.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 3060-3085.—Ed.]

[Syllabus approved by the court.]

INJUNCTION.

*Affirmed on appeal, *Smith v. Rockford*, 29 O. C. C. 000; decision on motion for temporary injunction, *Smith v. Rockford*, 17 Dec. 214.

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J. F. Loree and R. E. Layton, for plaintiff.

Mauk & Jackson, J. D. Johnson and Harry Conn, for defendants.

MATHERS, J.

This is an action by a taxpayer of the village of Rockford, seeking, in behalf of the village, to enjoin a threatened alleged abuse of corporate power by the village council, and the carrying out of certain contracts, alleged to be illegal, by some of the defendants who are contractors with the village for the street and sewer improvements hereinafter mentioned.

The right of the plaintiff to sue in this behalf was questioned at the hearing. It was urged that the municipal code only provides for such actions as this in the case of cities, but makes no such provision where villages are involved. That would be a strange doctrine which would deny to a citizen the equal protection of the laws merely because he happened to live in a village instead of a city. The provision of the code in the case of cities is merely a regulation of a right which a taxpayer has without these provisions. They do not create the right to appeal to the courts for the vindication of rights. This right exists independently of those statutes, though, since their passage, the courts would doubtless require applications to be made subject to their requirements. That the plaintiff may maintain this suit is abundantly established both in reason and authority. For the latter, see *Pomeroy, Equity Jurisprudence* (2 ed.) Secs. 276, 1345; *Dillon, Munic. Corp.* (4 ed.) Sec. 914; *Raynolds v. Cleveland*, 13 Dec. 125; *Cincinnati St. Ry. v. Smith*, 29 Ohio St. 291.

The council of the village of Rockford, in Mercer county, has taken action to improve two certain streets of the village, by grading, paving and draining the same, and to assess the cost thereof, by the front foot, on the lands and lots "bounding and abutting" thereon; and to construct two sewer improvements in the village and to assess the cost and expense thereof, in proportion to benefits, upon the bounding and abutting lots and contiguous territory. It has determined to pay the one-fiftieth of the cost of each improvement, and the cost of intersections, by a levy on all the taxable property of the corporation. It proposes to issue bonds in anticipation of the special assessments referred to, and to issue the bonds of the village to pay its said share of the improvements and the cost of the intersections. It has authorized and sold, and will deliver to the purchasers, unless restrained, \$17,000 of village bonds to raise money to pay the village's share and the cost of intersections aforesaid. The appraised valuation of all taxable property in the village is \$358,320, and 1 per cent of this is \$3,583.20. The village owns a waterworks, extensions of which have been made and contracted involving an expenditure of \$3,900, and bonds in the sum of \$2,000 have been issued in this behalf.

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Plaintiff contends that the proposed action of issuing the \$17,000 in bonds, as aforesaid, is *ultra vires*, inasmuch as it contravenes 96 O. L. 53, Sec. 100 (Lan. 4017; B. 1536-292) and the act of April 29, 1902 (95 O. L. 318; Rev. Stat. 2835; Lan. 4294), known as the Longworth bond act. These provisions of the statutes inhibit the creation, by the council of a municipal corporation, of a bonded indebtedness in any one fiscal year for any or all of the purposes mentioned in the act, in excess of 1 per cent of the total value of all property in the corporation listed and assessed for taxation, unless such excess is authorized by a vote of the electorate.

The defendants contend that the proposed issue of bonds is not to be made under 96 O. L. 53, Sec. 100, but by virtue of 96 O. L. 40, Sec. 53 (Lan. 3604; B. 1536-213), which provides that—

“Any city or village is hereby authorized to issue and sell its bonds as other bonds are sold to pay the corporation’s part of any improvement as aforesaid” referring to improvements which are to be paid for by special assessments on abutting or benefited property, “and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon.”

They contend that the corporation has, by law, two classes of powers, one general and the other special, to make such proposed improvements; that the general powers are enumerated in 96 O. L. 21, Sec. 7 (Lan. 3102; B. 1536-100) of the code, among which, in Subd. 18, is conferred power to improve streets, etc., and in Subd. 19, is conferred power to construct and to keep in repair sewers; and that 96 O. L. 21, Sec. 7, authorizes council to provide, by ordinance or resolution, for the enforcement and exercise of said powers. They contend that these so-called “general powers” authorize council to make street or sewer improvements at the general expense of the corporation, i. e., pay the entire cost and expenses thereof, by general taxation; and that when this plan is adopted, and then only, the provisions of 96 O. L. 53, Sec. 100, of the code apply. They contend that the so-called “special powers” of council are conferred in 96 O. L. 26, Sec. 9 (Lan. 3104; B. 1536-102), and that in the fifth subdivision thereof is the power to levy and collect special assessments; that the sections of the code relating to special assessments are exclusive, and in themselves are intended to delimit a plan for the construction of certain improvements, and among them street and sewer, which plan, if adopted by council, is not subject to the provisions of 96 O. L. 53, Sec. 100 (Lan. 4017; B. 1536-292), and the Longworth bond act (95 O. L. 318; Rev. Stat. 2835; Lan. 4294). Their contention is based on the theory that Sec. 100 and the Longworth bond act constitute a general provision, and that 96 O. L. 40, Sec. 53, is a special one, forming an exception to the general one, and, consequently, outside of and not to be affected by it.

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In the second division of the code, under the head of "Powers of Municipalities," are two subheads: the first being "General Powers," and the second being "Special Powers." Under the former is found 96 O. L. 21, Sec. 7, and Subds. 18 and 19, already mentioned; and under the latter is found 96 O. L. 26, Sec. 9 and the fifth subdivision thereof above mentioned. Counsel for defendants, who made the principal argument, seemed to find much significance in this division of powers, contending that Sec. 100 and the Longworth bond act, being a general provision, could only relate to the general power mentioned, and could not affect the special power, which was governed by 96 O. L. 40, Sec. 53, relating to bond issues on account of special assessments.

The infirmity of this reasoning is, that counsel confuses the power conferred to secure a certain end, viz., the power to make the improvements, with the power conferred to adopt a means to that end, viz., to pay for the improvements. It is obvious that whether an improvement is to be paid for by general taxation, or by special assessment, in either case the power to make the improvement at all is basic, and on it must rest the exercise of either plan of payment. So that, even if a so-called "special power" is to be exercised in paying for the improvement, as by a special assessment, yet this power cannot be exercised without also exercising the so-called "general power" to authorize or make the improvement. There is, therefore, nothing in the classification of municipal powers into general and special, that serves as a foundation for the contention that 96 O. L. 40, Sec. 53, being in aid of the delegation of the special power to levy and collect special assessments (Sec. 9, Subd. 5), must, for that reason, be an exception to the general provisions of Sec. 100 and the Longworth bond act, which, it is contended, relate only to the exercise of general powers (Sec. 7, Subds. 18 and 19). If counsel admit at all—and I think one of his premises involves that admission—that 96 O. L. 53, Sec. 100, and the Longworth bond act (95 O. L. 318) control the action of council in issuing bonds in order to effectuate the exercise of the general powers conferred by 96 O. L. 21, Sec. 7 (Subds. 18 and 19 of which relate respectively to the making of street and sewer improvements), he admits plaintiff's whole contention. For if the power to authorize or order or make the improvements be a "general power," and it is found in the delegation of so-called general powers (Sec. 7, Subds. 18 and 19), and if the improvements cannot be made except by exercising this power—and obviously they cannot—then it would seem to follow that that general power can only be exercised in conformity with limitations upon it which are an essential part of it.

By the same reasoning exactly by which counsel concludes that the power to levy and collect special assessments, being a special power, is entirely independent of the general power to make the improvements, may be said that the power to levy and collect taxes and the power

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to borrow money are special powers and entirely independent of the general power to make the improvement. The power to levy and collect taxes and the power to borrow money are both designated "special powers" in the code, being found enumerated in the same section as is the power to levy and collect special assessments, and being respectively Subds. 4 and 6 of 96 O. L. 26, Sec. 9. By 96 O. L. 33, Sec. 32 (Lan. 3980; B. 1536-192), being in aid of the delegation of the special power to levy and collect taxes, it is provided that—

"The council of every municipal corporation shall have power to levy and collect taxes upon all the real and personal property within the corporation for the purpose of paying the expenses of the corporation, constructing all improvements authorized and exercising all the general and special powers conferred by law."

This language of 96 O. L. 33, Sec. 32, does not support counsel's contention that special and general powers are mutually exclusive—are like the Jews and Samaritans and can have no dealings with one another. For to take the case put by counsel, of making an improvement and paying for it by general taxation, before council could effectuate an exercise of the general power to make or authorize the improvement (Sec. 7), it would have to exercise the special power (conferred in Sec. 32) to pay for it. Manifestly it is not the classification of powers, nor is it the character of the power, which determines the applicability of the Longworth bond act. The truth is, that all the powers interact, when occasion demands, and may be interdependent in order to effect a corporate object.

But aside from the reasoning based on the classification of powers, is there, in the code, ground for the contention that 96 O. L. 40, Sec. 53 is an exception to 96 O. L. 53, Sec. 100, and the Longworth bond act (95 O. L. 318)? Do Sec. 100 and the Longworth bond act, authorizing, as the latter does, the issue of bonds for street and sewer improvements, prescribe the general rule as to limitations of bonded indebtedness, and does, 96 O. L. 40, Sec. 53, authorizing council, as it again does, to issue bonds for street and sewer improvements, prescribe a special rule, which must operate independently of the general one in 96 O. L. 53, Sec. 100, and the Longworth bond act? The answer must be in the affirmative, if the two sections or provisions cannot be harmonized. Endlich, interpretation of Statutes Sec. 216, lays down the rule:

"If there are two acts, or two provisions of the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision."

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The code ought to be considered as a whole. The two sections involved, Secs. 53 and 100, are each contained in the code as it was adopted in the act of October 22, 1902 (96 O. L. 40, 53), and they remain as integral parts of it. Their provisions must have been within the legislative contemplation when the act was adopted. It is true the Longworth bond act is a piece of antecedent legislation, but 96 O. L. 53, Sec. 100, passed at the same time as 96 O. L. 40, Sec. 53, does not merely provide it "shall be and remain in full force and effect," but contains a renewal of the legislative intent that municipal corporations, when they issue bonds for purposes mentioned in the act shall be governed by its limitations. It is true the terms of the act are permissive as to the issue of bonds, but it is difficult to imagine how they could be anything else, for the legislature did not intend to direct council to issue bonds for the purposes mentioned.

The present constitution of Ohio requires the general assembly, by Art. 13, Sec. 6, to restrict municipal corporations in their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers. One of the purposes of the legislature, in enacting the act of October 22, 1902, commonly called the municipal code, was to carry out the constitutional requirement. It so declared itself in the preamble to that act. Where one of two constructions of a section or sections of the code will effect this declared purpose, and the other will not, the former will be adopted.

Starting with these premises, let us examine the meaning and the relation, if any, of 96 O. L. 40, 53, Secs. 53 and 100. Section 53 is primarily concerned with limiting special assessments. It requires, however, that the corporation shall pay at least one-fiftieth of the cost of any improvement which is specially assessed and also the cost of intersections. It then provides that the corporation may issue its bonds to pay its share of the expense of such improvements. The question is, Is this power to issue bonds subject to the limitations of the Longworth bond act? If it is, then, why, it may pertinently be asked, was the power here in 96 O. L. 40, Sec. 53 specially conferred, when the same power is conferred in the Longworth bond act? The only answer which suggests itself, and one which is not as satisfactory as it might be, is, that the duplication is the result of the heterogeneous character of the code, which consists of old statutes in connection with new ones. The general assembly evidently deemed it safer to leave many statutes relating to municipal affairs intact, either because they were generally understood, or had stood the test of experience or of attack in the courts, than to attempt to cover the same subjects anew. But notwithstanding the duplication of powers in this behalf, there is this consideration to be regarded, namely: Does the construction that 96 O. L. 40, Sec. 53, contains a special grant of power, and therefore, not subject to the limitations of the Longworth

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bond act, produce a result consistent with the declared legislative intention to restrict the power of municipal corporations to borrow money and contract debts? I think not, as will be shown later.

Section 53 is only operative when part of the cost of an improvement is to be specially assessed on abutting or benefited property. The mere fact that part of the cost is thus to be paid does not change the nature of the other part, the part which the corporation is to pay. To pay the corporation's part requires a levy on all the taxable property of the corporation, and bonds issued to pay the corporation's part are payable by general taxation. Such bonds are as essentially a part of the corporation's debts as would be bonds issued to pay the whole cost if it had been assumed by the corporation. The action of council, determining to pay one-fiftieth or any other portion, and to pay for intersections, is not a special assessment, and bonds issued therefor are not bonds which are to be paid by special assessment. Take, for instance, the case at bar. The assessment in the street improvement is by the front foot on the abutting lots and lands. On what lots and lands of the village can it be said that the one-fiftieth of the expense is to be levied by the foot front? Or on what lots and lands of the village can it be said the cost of the intersections is to be levied by the front foot? The levy for the village's share and for the intersections is not specially assessed on any lots or lands, but is generally assessed on all the property in the village, subject to taxation, personal as well as real. Neither, in the case of the sewer improvements, is the village's share, or the cost of intersections, a special assessment on the lots and lands of the village. The improvement was to be paid for by special assessment, according to benefits, on the bounding and abutting lots and contiguous territory. Can it be said that the levy to pay the village's share and for the intersections is a special assessment on all the lots and lands in the village in proportion to benefits, when there is no apportionment of assessment to special benefits to the lots and lands, and when, in fact, the village's share is assessed generally on not only the real but the personal property in the village subject to taxation? The general levy to pay the village's share and for intersections is radically different from a special assessment by the foot front or in proportion to benefits; it is, in fact, like any other general tax, and the corporation's share referred to in 96 O. L. 40, Sec. 53, and the cost of intersections, is paid by general taxation and not by special assessment.

Counsel's contention, that the village's share and the cost of intersections must be regarded as a special assessment, cannot, therefore, be maintained. And this conclusion is supported by the decision in *Comstock v. Nelsonville* (Vil.), 61 Ohio St. 288, 296 [56 N. E. Rep. 15], where it is said:

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"The only money which the municipality pays out of its treasury of money raised by levy on the general tax list, is so much of the cost and expense of the improvement as is not assessed against the property holders, and as to that part said Sec. 2702 is applicable, and must be complied with in order to make the municipality liable for such part of the cost and expense."

Original Rev. Stat. 2702 (see Lan. 3999; B. 1536-205), it may be remarked, parenthetically, required municipalities to have the money in the treasury before appropriating or spending it, and, in the language of the opinion in the foregoing case, at page 294:

"This can only apply to money raised, or to be raised, by a levy on the general tax list of the municipality."

In *Emmert v. Elyria*, 74 Ohio St. 125, the point seems to be decided that the same provision of the present code (96 O. L. 37, Sec. 45) making the same requirement in this respect as original Rev. Stat. 2702 (see Lan. 3999; B. 1536-205) of the former code, does not apply, not because the character of the corporation's share is different, but because by the provision of the new code (96 O. L. 40, Sec. 53), the corporation may issue its bonds to pay its share, and by 97 O. L. 44, Sec. 45a (Lan. 4000), when bonds are sold and in process of delivery, the certificate as to the money in the treasury is dispensed with.

It may be remarked, in passing, that the said case of *Emmert v. Elyria*, *supra*, which counsel for defendants cited as decisive of the case at bar, is not in point. Neither of the points decided in that case is involved in the case at bar.

Bonds issued for the purpose mentioned in 96 O. L. 40, Sec. 53, not being then special assessment bonds, but in character like any other bonds issued to pay for improvements not specially assessed, I fail to perceive any reason why they should not be subject to the same limitations as any other improvement bonds issued by council, for their effect on the corporation's credit and finances would be the same; that is to say, they would be an obligation of the corporation and payable by general taxation and not otherwise. And it must be remembered that the avowed intention of the legislature, in enacting the new code, was to restrict the power of municipal corporations to borrow money and contract debts. Unless 96 O. L. 40, Sec. 53, contains within itself a reason for excepting the limitation of the Longwerth bond act, it would seem to be applicable.

It was argued that the language of 96 O. L. 40, Sec. 53, in this behalf, warranted its exclusion from that act, because it was provided that council might issue and sell the corporation's bonds, and "levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon." But the authority to levy taxes in addition to all other taxes authorized by law to pay such bonds and interest, in no sense removes any restrictions on the power to issue the bonds. They

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are two separate and distinct things—the power to issue the bonds, and the power to levy a tax to pay them. The very absence of any limitation upon the power to tax in this behalf, causes one to search for the restriction, which, avowedly, the general assembly intended to put on the power of taxation. As the power to tax in this behalf is based upon and limited only by the power to issue bonds, it would seem that it must have been intended that the power to issue bonds for this purpose should be subject to some limitation, else the power of taxation is unrestricted. And the only limitation the power to issue bonds in this behalf is subject to is that of the Longworth bond act.

The court, during the progress of its investigation in this case, thought for a while that possibly there was a consequential limitation on council's power to issue bonds for the purposes mentioned in 96 O. L. 40, Sec. 53, by reason of the fact that as special assessments could not exceed 33 1-3 per cent of the value of the property assessed, bonds in excess of that amount could not lawfully be issued and that the extent of the improvement so to be assessed would determine the number of the intersections and the limits of the corporation's share of the cost and expenses. But a little reflection disclosed that it would be possible for the council to issue and sell bonds to create a fund to pay the corporation's share and for intersections of street and sewer improvements which were in contemplation only, and do so *ad libitum*, thus adding to the corporation's indebtedness to an extent which might become embarrassing, and thus evading one of the very things the general assembly avowedly intended to prevent. It would not answer to say that such action on the part of council would be an abuse of discretion which the courts would enjoin. If the statutes permit such action, the courts would be very slow to substitute their judgment for that of the council as to where a legitimate exercise of power would shade off into an abuse of discretion. The general assembly manifestly did not intend to repose in the power of the courts the restriction on the power of council to borrow money and contract debts. It said it would be found in the code itself, that the grant of power would be coupled with the restriction. And so, notwithstanding the apparent duplication of power to issue such bonds in 96 O. L. 40, 53, Secs. 53 and 100, that construction of these provisions will be adopted which will effectuate this declared intention to restrict and not that construction which will defeat it.

But there is another consideration pertinent to this inquiry. By an act of the general assembly, passed March 22, 1906 (98 O. L. 63), the whole Longworth bond act is re-enacted and Rev. Stat. 2835b (Lan. 4295) thereof amended so as expressly to exclude from the provisions and limitations of the act, "bonds which are to be paid for by assessments specially levied upon abutting property." It would seem from this action of the legislature, that prior to the amendment, such special

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assessment bonds were within the provisions and limitations of the act. If they were, it was by virtue of the general terms of the act itself, or of the provisions of the latter part of 96 O. L. 51, Sec. 95 (Lan. 4005; B. 1536-281), which reads as follows:

"Municipal corporations shall likewise have power to issue bonds in anticipation of special assessments, and such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which such special assessments are levied, and in the issuance and sale of such bonds the municipality shall be governed by all the restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of said bonds."

If they were within the provisions and limitations of the Longworth act solely by virtue of the reference to the "restrictions and limitations with respect to the issuance and sale of other bonds," contained in the latter part of 96 O. L. 51, Sec. 95, why, it may be asked, was not this reference stricken out of Sec. 95 by an amendment? This would have left Sec. 95 in substantially the same condition as is 96 O. L. 40, Sec. 53, so far as any specific limitation therein is concerned. It would have read as follows:

"Municipal corporations shall likewise have power to issue bonds in anticipation of special assessments, and such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which such special assessments are levied, and the assessments as paid shall be applied to the liquidation of such bonds."

It may be observed in passing, that this reading of 96 O. L. 51, Sec. 95,—which is the effect given that section by the amendment of Rev. Stat. 2835b (Lan. 4295),—is an express authority to issue bonds in any amount necessary to pay for the improvement, except that part which is to be paid by the corporation. Construing together Sec. 95, as thus read, and Sec. 53, as being *in pari materia*, it will be seen the legislature has expressly authorized council to issue bonds without limitation, to anticipate special assessments, but has not expressly so authorized where the corporation is to pay them. *Expressio unius est exclusio alterius*.

Evidently the legislature considered that the terms of the Longworth bond act would still be applicable to such bonds, even with 96 O. L. 51, Sec. 95, reading as just instanced. And so, in order to take such bonds out of the operation of the act, it deemed an amendment of that act necessary, expressly withdrawing them from its operation. The reason for excluding from the operation of the act bonds which are to be paid by special assessment on abutting property is, probably, that such bonds are really not payable by the corporation, but by the owner of the assessed property, and hence the obligation is not ultimately a corporate one, and it is the power to borrow money and contract debts for, and in

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behalf of, the corporation that is liable to be abused and is intended to be restricted. While the issuance of such bonds is, indeed, a loan of corporate credit, yet the legislature probably considered the limitation as to the amount of a special assessment a sufficient guaranty against the abuse of this power, as the assessed property owner might safely be relied on to resist an assessment in excess of 33 1-3 per cent. The legislature having then, by express enactment, withdrawn from the operation of the act street and sewer bonds, for instance, which are to be paid by special assessment, as not being within the purview of the act, is it not a satisfactory inference that all other bonds issued to pay for street and sewer improvements, are still within, and subject to, the provisions of the act, especially if they are within its purview?

It has been shown, I think, that the bonds mentioned in 96 O. L. 40, Sec. 53, are not bonds which are to be paid by special assessment; it has been shown that there is no limitation to their issue, if the Longworth bond act does not apply; it has been shown that they come within the purview of the Longworth bond act—that a lack of restriction in this behalf is one of the evils sought to be prevented by that act; it has been shown that the intention of the lawmaking power is to restrict the powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit by municipal corporations; it has been shown that, notwithstanding bonds issued to anticipate special assessments are authorized by a special section (Sec. 95), which by its terms yet subjects their issue to the same limitations and restrictions as other bond issues, yet the general assembly has expressly said they shall not be subject to the limitations and restrictions of the Longworth bond act, working thus an implied repeal of the limiting provisions of 96 O. L. 51, Sec. 95, and irresistibly suggesting the inference that all other improvement bonds, not somewhere also specially excepted, are within the provisions of the Longworth bond act; it has been shown that that act, as amended and re-enacted March 22, 1906, is not only the latest expression of the legislative will, several years subsequent to the adoption of 96 O. L. 40, Sec. 53, but that 96 O. L. 53, Sec. 100, partly constituted as it is, by this lately re-enacted Longworth bond act, is not inconsistent with the provisions of said Sec. 53, but, on the contrary, appears to be necessary in order to harmonize Sec. 53 with the declared intention of the general assembly to restrict municipal corporations in their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit. The court, therefore, cannot resist the conclusion that the power to issue bonds, mentioned in Sec. 53, is subject to the restrictions and limitations of Sec. 100 of the Longworth bond act, as amended and re-enacted March 22, 1906, and the court so decides.

It was urged, in behalf of the sewer improvements, that considerations of the public health, etc., might dictate a different conclusion.

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While such considerations might induce courts to adopt a liberal construction of statutes to secure the public health, yet the courts cannot legislate, and if the plain intent of the lawmaking power is ascertainable, no other consideration ought to rule the court than to declare it. The sewer improvement is not dictated by any imminent danger to the public health and none menaces it. If it did, the code (Sec. 43) provides for it.

The amendment of Rev. Stat. 2835b (Lan. 4295), of the Longworth act, also excludes from consideration, in arriving at the limitations provided in that act, "bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges, and to pass a sufficient amount to a sinking fund to retire such bonds when they become due." It was admitted at the trial that the income from the Rockford waterworks is not sufficient to do these things. The bonds, therefore, which were issued and sold to provide for extensions, must be considered in determining the bonded indebtedness referred to in Rev. Stat. 2835 (Lan. 4294) of the Longworth act. Their amount is \$2,000. These appear to be the only outstanding bonds issued for any of the improvements contemplated by the Longworth act. The difference between this amount and 1 per cent of the total valuation of property in the village is \$1,583.20. An issue of the village's bonds, in excess of \$1,583.20, for any of the improvements mentioned in the petition, would clearly be illegal, unless authority should first be given by an affirmative vote of the qualified electors of said village. As the amount of bonds necessary to pay the village's share of any one of the proposed improvements will exceed what it may lawfully issue, and as the improvements must be complete to be at all serviceable but cannot be completed unless the village shall pay at least one-fiftieth of the cost and expenses and pay for the intersections, the proposed issue of bonds in the case of each improvement ought to be enjoined.

If enough people of the village do not approve of the proposed improvements to authorize the council to issue bonds in sufficient amount in excess of this 1 per cent to pay the corporation's share and for the intersections, council will have to make the improvements separately and not so extensive as to necessitate its exceeding, in any one fiscal year, the limitation prescribed by law on its bonded indebtedness.

The several issues of bonds being illegal, they cannot be said to be in process of delivery and their proceeds in the treasury, as contemplated and provided for by 97 O. L. 44, Sec. 45a; and as it is admitted that no money was in the treasury to pay the village's share of the cost and expenses of the improvements and for intersections, as required by 96 O. L. 37, Sec. 45, the contracts entered into with the defendant contractors are not binding on the village.

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The foregoing considerations and conclusions render any comment on the other questions raised unnecessary.

As the plaintiff sues in behalf of the village, and the facts warrant the relief prayed for, it will be granted, and the defendants and all of them will be enjoined from entering upon the prosecution of the street and sewer work described in the petition, and the council from delivering or disposing of the bonds described therein, and the injunction heretofore granted herein will be made perpetual.

LIFE INSURANCE—DISTRIBUTION.

[Superior Court of Cincinnati, Special Term, March, 1907.]

KNIGHTS TEMPLAR & MASONIC MUT. AID ASSN. v. MARTHA A. HEY ET AL.**INSURANCE CONTRACT MADE IN OHIO GOVERNED BY LAWS OF OHIO.**

Where insurance in a mutual aid association is contracted for with reference to the laws of Ohio, and the policy is executed in Ohio and is made payable in Ohio, the Ohio law as to distribution governs; and the insured, a resident of New York, having left at his death a widow and certain next of kin, but no children, the proceeds of the policy are distributable to the widow under the Ohio law, and not to the widow and next of kin under the New York law.

[For other cases in point, see 2 Cyc. Dig., "Conflict of Laws," §§ 39-131.—Ed.]

[Syllabus approved by the court.]

T. M. Hinkle, for plaintiff.

W. B. Crittenden, for the widow.

H. R. and R. N. Pollard, for next of kin.

HOFFHEIMER, J.

Plaintiffs herein issued a certain certificate of insurance payable to the "heirs of Levi Hey." The insured, a resident of New York, died leaving a widow and no children and also certain next of kin, defendants in this action. The widow claims the entire fund under the laws of Ohio. Those of the next of kin who have not assigned their interests to the widow assert a right to participate in the fund by virtue of the laws of New York, which it is claimed on their behalf governs.

The question to be determined is, therefore, Who is the proper person or persons to whom said benefit is payable? The next of kin claims by virtue of Sec. 2732 of the code of civil procedure of the state of New York. By the terms of that statute (the fund being then distributed as though deceased had died intestate as to it) the widow would receive one-half of the fund and \$2,000 additional. The small balance would then be allotted in the proper amounts to the next of kin. In my judgment, however, the next of kin are entitled to no part of this fund as

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its distribution is governed solely by the laws of Ohio and not by the laws of New York. The conceded facts show that the insured contracted with reference to Ohio laws and in pursuance to Ohio statutes. As a matter of fact, the policy was executed at Cincinnati and it further appears that originally the applicant desired the policy made payable to "self," but upon being informed that this would make the policy void under Ohio law, consented to take a policy payable to "heirs" in order that the policy might be valid. The policy was accordingly issued. The contract, it seems to me, was clearly an Ohio contract. Not only was the policy issued at Cincinnati, but it was payable at Cincinnati. The *lex loci solutionis* governs. In *Hall v. Cordell*, 142 U. S. 115, 116 [12 Sup. Ct. Rep. 154; 35 L. Ed. 956], questions as to a performance were determined by law of the place of payment. See also *Coghlan v. Railway*, 142 U. S. 101, 110, 111 [12 Sup. Ct. Rep. 150; 35 L. Ed. 951]. Notwithstanding the residence of the insured at New York the validity, obligation and effect of the policy must be determined by the laws of this state. See *Montana Coal & Coke Co. v. Coal & Coke Co.* 69 Ohio St. 351 [69 N. E. Rep. 613].

Looking to the policy itself as to the meaning and scope of the word "heir" I think that it was intended from the language used that the widow was designated as the heir. See Art. 4, Sec. 3 of the by-laws on the back of the policy, which reads:

"Upon due notice and satisfactory proof of the death of a member of the association, the finance committee shall, within sixty days, pay the widow, children, or legal representatives of the deceased member, the sum of 75 per cent, of the assessment collected and on hand at the time of his death; provided, however, said sum paid shall in no case exceed in amount, the face of the certificate held, or be more in proportion than would be paid to the holder of a \$5,000 certificate if he were dead."

If, however, it is said that the intent cannot be found from the context and resort be had to the statutes to ascertain the heir, then in the absence of children the widow must still be held to be the proper person to whom the fund here involved is to be given. I therefore hold that the widow of Levy Hey, deceased, namely, Martha A. Hey, is the sole distributee of the fund in question. Upon payment of the costs of this proceeding and the allowance to counsel for plaintiff of a reasonable fee, which I hereby fix in the sum of \$200, a decree may be taken accordingly.

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CRIMINAL LAW—INSURANCE—MONOPOLIES—STATUTES.

[Lorain Common Pleas, June 8, 1907.]

*STATE OF OHIO v. M. O. BOVEE ET AL.

1. COMBINATIONS OF INSURANCE AGENTS NOT VIOLATION OF ANTITRUST LAW.

The business of soliciting and selling fire, lightning or tornado insurance is not commerce; contracts of insurance are not commodities, and the insurance business is not a trade so as to come within the meaning of these terms as used in the Valentine antitrust law, Lan. 7586 (B. 4427-1) *et seq.*

2. CONSTRUCTION OF CRIMINAL STATUTES.

In Ohio an act is not criminal unless made so by statute, and the statute should describe the act which is forbidden with reasonable certainty, and where a word which has two significations is used in a statute, it should ordinarily receive that meaning which is generally given to it.

[For other cases in point, see 3 Cyc. Dig., "Criminal Law," §§ 12-49.—Ed.]

3. EFFECT OF CONSTRUCTIONS OF COURTS OF FOREIGN STATE ON LAWS ADOPTED FROM THAT STATE.

When the Ohio legislature adopts the law of another state it does so intending that it shall receive the same construction by the Ohio courts that had been put upon it, up to the time of its enactment in Ohio, by the courts of the state from which it is adopted.

[For other cases in point, see 7 Cyc. Dig., "Statutes," §§ 438-442.—Ed.]

[Syllabus approved by the court.]

DEMURRERS to indictment.

F. M. Stevens, prosecuting attorney, for plaintiff.

Stroup & Fauver and Thompson, Glitch & Cinniger, for defendants.

WASHBURN, J.

At the April term, 1907, of the court of common pleas of Lorain county, Ohio, twenty-three individuals and one corporation were jointly indicted under Lan. 7586 (B. 4427-1) *et seq.*, known as the Valentine antitrust law, for combination in restraint of trade.

The indictment contains four counts, each charging the offense in identical language, but on different dates, the charge being that the defendants—

"Unlawfully did conspire, combine, confederate, agree and associate themselves together to create and carry out restrictions in the trade, business and commerce of insuring property against loss and damage by fire, lightning and tornado, and to increase the price, premium and rate of such insurance and to prevent competition in the making, sale and purchase of such insurance and to fix the price, premium and rate of such insurance at a standard and figure, whereby its price to the public and to the consumer shall be established and controlled,

*For prior contra holding, see *State v. Ross*, 16 Dec. 704.

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in that the price, premium and rate of such insurance shall be maintained as fixed, and to make, enter into, execute and carry out contracts, obligations and agreements to keep and maintain the price of such insurance at a graduated figure, to not sell or dispose of such insurance below a common standard and fixed value, to establish and settle the price of such insurance between themselves and between themselves and others, so as to preclude a free and unrestricted competition among themselves in the sale thereof, and to pool, combine and unite their interests in the sale of such insurance so as to affect the price thereof; and that they" (naming the defendants) "then and there unlawfully acted with, were members of, aided and assisted in carrying out the purposes of, said unlawful trust and combination, the exact name of which is to the grand jurors unknown, then and there being and existing for each and all of the aforesaid unlawful purposes and which said trust and combination did then and there unlawfully bring about, effect and accomplish each and all of the aforesaid purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio."

To this indictment the defendants have each, with one exception, interposed a demurrer, upon several grounds, the principal ground being that the facts stated do not constitute an offense punishable by the laws of the state of Ohio.

The principal question presented by the demurrers is, whether or not the business of fire insurance is included in the terms "trade," "commerce" or "commodity" as the same are used in the Valentine law. The object of that law, as stated in its title, is "To promote free competition in commerce and all classes of business in the state." Section 1 declares that:

"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or any two or more of them, for either, any or all of the following purposes:

- "1. To create or carry out restrictions in trade or commerce.
- "2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.
- "3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
- "4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.
- "5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport

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any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

Without stopping to quote the definitions of the word "commodity" as given by lexicographers, it is sufficient to say that the word as commonly used and understood means something movable and tangible. It is true that the word "commodity" in its broad sense is said to mean "convenience, accommodation, profit, benefit, advantage, interest, commodiousness," but its use in that sense has become obsolete. In that sense it cannot be said to be a thing that can be produced, used or transported, and the act in question, as shown by reference to the terms used in Subds. 2, 3, 4 and 5 of Sec. 1, refers to things that can be "produced," "manufactured," "made," "transported," "sold," "used" or "consumed;" hence I think that the word "commodity" was used in this act in its ordinary and well-understood commercial sense of something that is produced or used and is the subject of barter or sale, something movable and tangible. In the opinion of the case cited hereafter, *Paul v. Virginia*, 75 U. S. (8 Wall.) 168 [19 L. Ed. 357], it is said that contracts of insurance are not commodities. I will later refer to an Iowa case which decides that insurance is a commodity.

The word "commerce," as ordinarily used, has to do with the sale or transportation of commodities or tangible and movable things, but it is a term of wide import, and it includes communications and intercourse for the purpose of trade in any and all its forms, and yet the Supreme Court of the United States, by repeated decisions, has held that—

"The issuing of a policy of insurance is not a transaction of commerce—but is a simple contract of indemnity against loss." *Paul v. Virginia*, *supra*.

Mr. Justice Field, in deciding this case, uses this language:

"These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or for-

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warded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration."

In 1895 the Supreme Court of the United States reiterated this doctrine in the following language:

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" *Hooper v. California*, 155 U. S. 648, 655 [15 Sup. Ct. Rep. 207, 210; 39 L. Ed. 297].

And the same court again, as late as 1900, specifically decided that "The business of life insurance is not commerce." *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 [20 Sup. Ct. Rep. 962; 44 L. Ed. 1116].

So far as I know, no court has decided to the contrary, and I therefore hold that the word "commerce," as used in the act in question, does not include the business of fire insurance.

The word "trade" is ordinarily understood as meaning one's occupation or employment, or else the business of buying and selling. In the latter sense it is of no wider import than "commerce" or "traffic," for "trade," in the sense of "exchanging commodities by barter, the business of buying or selling for money," has to do with movable and tangible things.

In the exemption laws of certain states the word "trade" is used in the broad sense of occupation or employment, and in the state of Texas, where the law exempted from attachment and execution all tools, apparatus and books belonging to "any trade or profession," the words "any trade or profession" were construed to include all employment and to include the business of an insurance agent so as to entitle him to the exemption therein provided for. *Betz v. Maier*, 12 Tex. Civ. App. 219 [33 S. W. Rep. 710].

In its broadest sense the word "trade" applies not only to skilled handicraft, but to any business that a man regularly engages in for a livelihood. If this broad meaning was intended, then the law applies to practically all business affairs, not only to the production, consumption, use, sale and transportation of tangible things, but to all cases where any occupation or employment is engaged in for the purpose of profit or gain, or a livelihood, except the learned professions. In this broad sense it would include the occupation of the mechanic, the laborer, the agent, clerk or servant and all those who are employed for hire, except the lawyer, doctor, minister and those engaged in the liberal arts.

If that is the sense in which the word "trade" is used in this act, then it is made a criminal offense for two men to agree with each other not to work for less than two dollars per day. That construction would

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render illegal all that class of unions and combinations of working men and tradesmen which are unqualifiedly recognized to be lawful and which have been encouraged and protected by the state. That men can combine for the purpose of regulating their wages by proper means, is now the settled law of the land; and such a combination was held not to be made criminal by a law very similar to our antitrust law. *Hunt v. Co-operative Club*, 140 Mich. 538 [104 N. W. Rep. 40].

Before giving to the Ohio statute a construction which will render criminal all combinations of laboring men, the court should be satisfied that such was the intention of the legislature.

It has been suggested that this statute applies only to such combinations as were illegal at common law, and that such construction would exclude labor combinations and include insurance combinations, but that construction would render the law very indefinite and uncertain, for many combinations are legal at common law, and but few people know what combinations are legal and what are illegal at common law. In fact, few attorneys without research and study know just what combinations are upheld and enforced and what are illegal and unenforceable under the common law. In Ohio an act is not criminal unless made so by statute, and the statute should describe the act which is forbidden with reasonable certainty, and where a word which has two significations is used in a statute, it should ordinarily receive that meaning which is generally given to it.

It will be noticed that the word "trade" is used just twice in Sec. 1 of the act hereinbefore quoted,—in Subd. 1, where "restrictions in trade" are spoken of, and in Subd. 5, where reference is made to "any commodity or any article of trade, use, merchandise, commerce or consumption." It is apparent that as used in Subd. 5 the word "trade" has reference to something movable and tangible.

Throughout the act terms are used which clearly indicate that the legislature had in mind concrete things which could be produced, transported, used or consumed. The language of Subd. 4 is: "any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state." To say that this language describes such an intangible thing as a contract of indemnity by which one person insures the property of another against loss by fire, is certainly to disregard the ordinary meaning of words.

That the terms "merchandise, product, or any commodity" were not intended to include intangible things, is shown by the fact that the legislature took particular pains to mention "transportation" among the list of things which might be the subject of a trust, thus evidently not intending to include such an intangible thing as transportation within the definition of such tangible things as "article" or "commodity."

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The transportation of an article is as much trade as is the insurance of an article, and as combinations for the purpose of preventing competition in the transportation of an article are specifically prohibited in Subd. 3 of Sec. 1, it is evident that the legislature did not intend to include transportation in the word "trade" as used in Subd. 1, or the words "merchandise" or "commodity" as used in Subd. 2, or the words "merchandise, product, or any commodity" as used in Subd. 3, thus showing that the word "trade," as used in Subd. 1, was not used in its broadest sense, but rather in the sense of barter and sale.

If the term "restrictions in trade," as used in the first subdivision, is given its broadest and most comprehensive meaning, it includes all that is thereafter described in Subds. 2, 3, 4 and 5, and much that is not included in said subdivisions; hence, if it had been used in this broad sense, there was no need for the specific restrictions contained in Subds. 2, 3, 4 and 5—they were included and covered in Subd. 1. Indeed, it seems quite apparent that Subd. 1 is explained by Subds. 2, 3, 4 and 5, and that "trade" as there used has reference to the business of selling or exchanging some tangible substance or commodity for money; at least, it does not clearly appear that it was used in its broadest and most comprehensive sense.

This is a criminal statute and must be strictly (*State v. Meyers*, 56 Ohio St. 340, 350 [47 N. E. Rep. 138]) but fairly (*Barker v. State*, 69 Ohio St. 68 [68 N. E. Rep. 575]) construed, and any reasonable doubt that there may be should be resolved in favor of the defendants. In construing a statute the court has a right to consider the history of the legislation, the cause or necessity for it, its object and what appears best calculated to advance the same, for the purpose of determining what the intent of the legislature was in enacting the law. The history of the law in question shows that the necessity for it grew out of the fact that there had been great combinations of corporations and capitalists for the purpose of controlling the price of tangible things—articles of prime necessity—or the charges for the transportation of the same, and that the state of Texas long before the Ohio law was passed had enacted a law very similar to what is now the Ohio law; in fact, the Ohio law is almost a literal copy of the Texas law, and before the Ohio law was passed the supreme court of Texas had decided that the legislature did not intend, in the use of the terms "restrictions in trade," "commerce" and "commodity," to include the business of fire insurance. *Quern Ins. Co. v. State*, 86 Tex. 250 [24 S. W. Rep. 397; 22 L. R. A. 483]. Then the legislature of Texas amended the law so as to include the business of insurance, and thereafter the legislature of Ohio enacted the law in question, following, except as to title, practically the original Texas statute, and specifically omitting the provision in the amended Texas statute which brought the business of insurance within the terms

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of the statute. The title to the Texas statute states that the law was passed "to promote free competition in the state of Texas," while the Ohio statute recites that it is an act "to promote free competition in commerce and all classes of business in the state."

But for this difference in the title of the Ohio statute the conclusion that the legislature of Ohio intended to enact a law which did not include insurance, is irresistible, and, considering the kind and character of the combinations which brought about the necessity for the legislation, I cannot give to the change in the title of the Ohio act a force and effect which would overcome the intention not to include the business of insurance in the act which is shown by the deliberate omission from the body of the law of the provision in reference to insurance.

The title of the act is proper to be considered in determining the intention of the legislature in enacting the law, but it cannot be given controlling force in a criminal statute so as to give words of the law itself a meaning repugnant to that which, but for the title, is apparent from a consideration and fair construction of the law itself. *Bennett v. Lewis*, 7 Ohio (pt. 1) 80, 86; *Seeley v. Thomas*, 31 Ohio St. 301, 306; *Sutherland*, Statutory Construction Sec. 339.

The statute of Ohio is, as I have said, practically identical with the first Texas act, and the rule is, that where our legislature adopts the law of another state it does so intending that it shall receive the same construction by the Ohio courts that had been put upon it, up to the time of its enactment in Ohio, by the courts of the state from which it is adopted.

"When a statute is taken principally from the statute of another state and prior to its adoption had received a construction in that state, it is reasonable to suppose that the legislature in adopting this provision did so in view of the construction which had been put upon it and with the intention that it should receive the same construction here." *Favorite v. Booker*, 17 Ohio St. 548; see also *Ives v. McNicoll*, 59 Ohio St. 402 [53 N. E. Rep. 60; 43 L. R. A. 772; 69 Am. St. Rep. 780], and *Gale v. Priddy*, 66 Ohio St. 400 [64 N. E. Rep. 437].

Having in mind that this is a criminal statute, a careful reading and consideration of the whole act leads me to the conclusion that the words in question were used in their ordinary and commonly-understood meaning and not in their obsolete or unusual meaning, and that the legislature intended the act to apply to tangible things, their manufacture, making, production, transportation, sale or purchase, and that it did not intend the law to apply to insurance. *Runck v. Cloud*, 8 N. P. 436.

I have not overlooked a case reported in *State v. Phipps*, 50 Kan. 609 [31 Pac. Rep. 1097; 18 L. R. A. 657; 34 Am. St. Rep. 152], but that merely holds that where insurance was specifically mentioned in the

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body of the law it indicated a legislative intention to use the word "trade" in the title of the act in a sense broad enough to include the business of insurance. Neither does the case reported in *State v. Insurance Co.* 152 Mo. 1 [52 S. W. Rep. 595; 45 L. R. A. 363], apply to the case at bar, because the law in that case especially mentioned and prohibited combinations of those engaged in the insurance business.

Counsel insist that this court should follow the supreme court of Iowa, where it is held that the word "commodity" in a somewhat similar statute included the business of fire insurance. That statute prohibited combinations "to regulate or fix the price of oil, lumber, coal, flour, provisions, or any other commodity or article whatever," and the supreme court of Iowa held that the business of fire insurance was included in the term "any other commodity or article whatever;" but in so deciding the court violated a well-settled rule of construction, which is, "General words following particular and specific words must, ordinarily, be confined to things of the same kind as those specified." *Shultz v. Cambridge*, 38 Ohio St. 659.

Here the words "oil, lumber, coal, flour and provisions" all refer to tangible and movable things, and the word "commodity," while including all of them, embraced many other things of the same general kind, and under the above rule the word "commodity" applied only to things like oil, lumber, etc., which were tangible and movable. In spite of that, the court gave to the word "commodity" an obsolete and unusual meaning and held that it included the business of insurance, because "there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law." The court recognized the fact that the business of insurance was not clearly within the provisions of the law, but seemingly held that it ought to be, and therefore was included. I do not regard the case as authority, for in Ohio "a statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute." *State v. Meyers*, *supra*.

There may be good reasons why combinations by insurance agents for the purpose of increasing rates of insurance should be prohibited, but that will not justify a court in holding that such combinations are prohibited by a law which prohibits combinations with reference to articles which may be produced, transported and used and which are the subject of barter and sale.

If it is thought wise to extend the provisions of the antitrust law of Ohio so as to include the business of insurance, labor unions and everything about which a person may be engaged, the legislature can very easily use language which will clearly express that intention, but

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it is sufficient for the determination of this case to say that such intention does not clearly appear from a consideration of the present law.

Before an act can be held to be criminal in Ohio it must clearly appear that the legislature intended to make that act criminal. "It must be borne in mind that we have no common-law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio unless such act or omission is specifically enjoined or prohibited by the statute laws of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code has not the expansiveness of the common law." *Smith v. State*, 12 Ohio St. 466, 469 [80 Am. Dec. 355].

The demurrers will, therefore, be sustained and the defendants discharged.

CONSTITUTIONAL LAW—STATUTES.

[Hamilton Common Pleas, 1907.]

STATE OF OHIO V. W. KESLEY SCHOEPF ET AL.

1. ACT OF FEBRUARY 9, 1906, HELD INVALID.

The act of February 9, 1906 (98 O. L. 5), amendatory of Lan. 5538 (B. 3443-3) creates a new offense, viz., failure to provide a heating device for motormen, without prescribing any penalty for such offense. It is therefore inoperative and void.

[For other cases in point, see 7 Cyc. Dig., "Street Railways," § 428.—Ed.]

2. REPEALING CLAUSE OF VOID AMENDATORY STATUTE, HELD INOPERATIVE.

Where an inoperative or void act, amendatory of a previous valid statute, contains a section attempting to repeal such previous valid statute, said repealing section is also void and said previous valid statute remains in full force and effect as it was prior to said attempted amendment, unless it clearly appears that it was the intention of the legislature to repeal said former statute without reference to whether the attempted amendment was valid or not.

[For other cases in point, see 7 Cyc. Dig., "Statutes," §§ 158-173.—Ed.]

3. SUFFICIENCY OF INDICTMENT.

In an indictment under Lan. 5538, 5539 (B. 3443-3, 3443-4) which charges that it was the duty of the accused to carry out the provisions of said sections, it is not necessary to aver how or by whose authority such duty was imposed.

[Syllabus by the court.]

MOTION to quash indictment.

Outcalt & Foraker, for plaintiff.

Rulison, Morris, Sawyer & Rose, for defendants.

BROMWELL, J.

The indictment in this case charges that defendants—

"Did unlawfully, wrongfully and knowingly, permit an electric motor street car, designated as No. 484, on the Warsaw avenue line of

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the Cincinnati Traction Company, said car not being a trail car or a car attached to a motor car, to remain unprovided with a screen constructed of glass or other material at the forward end thereof, whereby the motorman, who was stationed at the forward end of said car, by said the Cincinnati Traction Company, and who was then and there engaged in guiding and directing the motor power of same by which said car was being propelled on the rails of said company that traverse the streets of the city of Cincinnati, in said county, was not fully and completely protected from wind and storm, in this, to wit: that one side of said forward end of said car was completely open to wind and storm, and no heating device of whatsoever kind or character thereof, was thereon provided, the said electric street car then and there belonging to, and being operated and used by, the said the Cincinnati Traction Company, a corporation under the laws of Ohio, upon the streets of Cincinnati as aforesaid, the said W. Kesley Schoepf, being then and there an officer and agent thereof, to wit, president; the said Robert E. Lee being then and there an officer and agent thereof, to wit, the general superintendent; the said Newton Wickersham being then and there an officer and agent thereof, to wit, division superintendent of the Eighth street division of said company, and it being their duty as such officers and agents of said company as aforesaid, to provide a screen on said forward end of said car that would fully and completely protect said motorman from wind and storm as aforesaid, * * *."

The offense charged is a violation of Lan. 5538 (B. 3443-3), the language of which is as follows:

"Section 1. That every electric street car other than trail cars, which are attached to motor cars, shall be provided, during the months of November, December, January, February and March of each year at the forward end with a screen constructed of glass or other material, which shall fully and completely protect the driver or motorman or gripman or other person stationed on such forward end, and guiding and directing the motor power by which they are propelled, from wind and storm, and the space provided on such car for such person shall, during the said months be provided with a sufficient heating device to maintain a temperature at all times not below sixty degrees Fahrenheit."

The penalty for the violation of this section is contained in Lan. 5539 (B. 3443-4), reading as follows:

"Section 2. Any person, agent or officer of any association or corporation violating the provisions of this act shall, upon conviction, be fined in any sum not less than \$25 nor more than \$100 for each day each car belonging to and used by any such person, association or corporation is directed or permitted to remain unprovided with the screen required in section one [Lan. 5538; B. 3443-3] of this act; and it is

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hereby made the duty of the prosecuting attorney of each county of this state to institute the necessary proceedings to enforce the provisions of this act."

Defendants filed a motion to quash the indictment on the following grounds:

1. Because said indictment does not in form or substance charge an offense against any valid law of the state of Ohio.
2. Because said indictment attempts to charge an offense which does not exist under any law of the state of Ohio.
3. Because said indictment contains matter which in form and substance is redundant and irrelevant.
4. Because said indictment in the form and manner in which an offense against the laws of Ohio is attempted to be charged, does not require a plea from either of said defendants.
5. Because said indictment is bad in form and substance in that it fails to state by what lawful authority a duty was imposed upon either or all of said defendants to provide the screen described in said indictment.
6. Because no duty is imposed by law upon either or all of said defendants to provide said screen upon the car designated and described in said indictment.

In support of the above motion defendants claim in argument—

1. "That there is a defect in the statutes cited above which makes them inoperative and that, therefore, the indictment charges no offense against any valid law of the state, and—
2. "That the indictment is defective in not averring that the duty of defendants or any of them to carry out the provisions of the statute was imposed upon them by any valid law."

We will consider these claims in their order and, that we may understand the argument on the first claim, will briefly state the history of the two sections of the statute referred to.

Laning 5538 (B. 3443-3) was originally passed April 20, 1893 (90 O. L. 220), exactly as it appears in the existing statute, with the exception that it did not contain the clause requiring the heating of the vestibuled space. This clause was added to the original act by amendment passed February 9, 1906 (98 O. L. 5), and at the same time and by this last-named act an attempt was made to repeal the original section.

By oversight or otherwise Lan. 5539 (B. 3443-4), which prescribed the penalty for the offense set out in the original act, was not amended so as to provide for any additional penalty for a violation of the heating clause, but remains in its original form which prescribes a fine for "each day each car * * * is directed or permitted to remain unprovided with the screen required in Sec. 3443-3 [Lan. 5538]."

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There is no penalty for violation of the requirement that the space shall be heated. In other words, the amending act of 1906, fails to attach any penalty to the new offense which is created but does seek to repeal the original act.

There is no question that the original sections were constitutional as that fact was so found in the case of *State v. Nelson*, 52 Ohio St. 88 [39 N. E. Rep. 22].

But defendants claim that the defect in the amending act above referred to renders the entire act, as it now stands upon the statute book, inoperative and that the indictment being drawn under such act should be quashed because no offense can be charged for violation of such inoperative act.

Briefly stated, the issue raised is this: What is the effect upon a valid existing act if an attempt is made to amend it by an inoperative or void act which at the same time attempts to repeal the original valid act? Does it destroy the original act by the attempted repeal and, at the same time, create a new act incapable of enforcement? Or, does it merely render the amendment futile both as to the new matter attempted to be added to the offense and as to the attempted repeal of the original act?

Fortunately, we are not confined to a mere theoretic conclusion based on speculation, as this question has been passed upon in a number of well-considered cases and is regarded by text-book writers as settled. As a rule the cases referred to have been decided upon amendments which were unconstitutional instead of inoperative, as claimed in this case, but the principle is the same.

We regard it as elementary that no statute creating a penal offense which contains no penalty for its violation is enforceable. As the amended act of 1906 provided no punishment for the violation of the heating clause in the amended act it is our opinion that the said act is unenforceable and inoperative. The question then to be determined is whether the original act, as it stood prior to the attempted amendment, is still in force.

Quite recently our circuit court had the identical question before it in the case of the *State v. Mackelfresh*, 29 O. C. C. 499, a proceeding in quo warranto involving the consideration of Rev. Stat. 568 (Lan. 900), and also 91 O. L. 78 and 92 O. L. 59. The court found that 91 O. L. 78, which amended Rev. Stat. 568 (Lan. 900), was unconstitutional and that 92 O. L. 59, which amended 91 O. L. 78, was also unconstitutional, and that although each contained a repealing section of the act which it attempted to amend, the repealing section being part of an unconstitutional act was itself inoperative and that the original Sec. 568 remains in force.

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The court in its decision refers to the case of the *State v. Buckley*, 60 Ohio St. 273 [54 N. E. Rep. 272], the third and fourth syllabus of which are as follows:

3. "Section 2926b [Lan. 4446] (92 O. L. 166) Rev. Stat., excepts from its operation the city of Mansfield and cities of the fourth grade of the first class and is therefore unconstitutional."

4. "The said section being inoperative, the repealing section contained in the same act is also inoperative, and this leaves said Sec. 2926b [Lan. 4446], as amended April 28, 1890 (87 O. L. 359), in force."

In the case of the *State v. Heffner*, 59 Ohio St. 368 [52 N. E. Rep. 785], the third syllabus is as follows:

3. "The act of April 26, 1898, 'to amend Secs. 1202 and 1203 [Lan. 2567, 2568] of the Revised Statutes (93 O. L. 351),' is void including its repealing section, and said original sections continue in force notwithstanding said act."

In the case of the *State v. Smith*, 48 Ohio St. 211 [26 N. E. Rep. 1069], the court said, on page 219:

"As the act itself is invalid, the repealing clause must also be held inoperative."

In the case of *Meshmeier v. State*, 11 Ind. 482, the court held that where an amendatory act containing a clause repealing an existing statute was unconstitutional, the repeal, might nevertheless be good and the existing law be repealed by virtue of said amendatory act even though unconstitutional.

But the supreme court of that state, in a subsequent case, *State v. Blend*, 121 Ind. 514 [23 N. E. Rep. 511; 16 Am. St. Rep. 411], said:

"In the case of *Meshmeier v. State*, 11 Ind. 482, it was held that a repealing clause attached to an unconstitutional act of the legislature might repeal a former valid statute upon the same subject. The general principle announced in that case is undoubtedly correct; for it must be conceded that the legislature may use such language in the repealing clause attached to an unconstitutional law as to leave no doubt as to its intention to repeal a former law in any event. In such case the law intended to be repealed would cease to exist, even though the law to which the repealing clause is attached should fail by reason of being in conflict with the constitution. Where, however, it is not clear that the legislature, by a repealing clause attached to an unconstitutional act, did not intend to repeal a former statute upon the same subject, except upon the supposition that the new act would take the place of the former one, the repealing clause falls with the act to which it is attached."

Bishop, Written Laws Sec. 34, says:

"An act consisting of affirmative provisions and a repealing clause may be void as to the former and good as to the latter. Yet, practically, this would not be so, commonly; because in most instances the new pro-

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vision is the motive for repealing the old, so that where the new cannot stand the repeal should not."

In the case of *Backenstoe v. State*, 14 Dec. 580, certain sections of the statute were found to be unconstitutional and the court said:

"They are necessarily a nullity, and I must so hold, and by reason thereof it follows that the jurisdiction of the police court of this city exists under and by virtue of unrepealed sections."

In the case of *Gorman v. Bepler*, 7 Dec. 15 (4 N. P. 241, 242), the first clause of the syllabus is as follows:

"1. The act of April 13, 1894 (91 O. L. 135), having been declared by the Supreme Court to be unconstitutional and void * * * the remaining parts of the act, together with the repealing clause, are also invalid."

In the case of *Tims v. State*, 26 Ala. 165, the fourth syllabus is:

4. "A repealing clause in an unconstitutional statute, declaring 'that all laws contravening the provisions of this act be, and the same are hereby, repealed,' does not affect the previous laws."

In the case of *Sullivan v. Adams*, 69 Mass. (3 Gray) 476, the court said:

"A statute which expressly repeals all acts inconsistent with its provisions has no effect on acts inconsistent only with a void clause in the repealing statute."

In the case of *Shepardson v. Railway*, 6 Wis. 578, the syllabus is:

"An unconstitutional act of the legislature, amendatory to the charter of the Milwaukee and Beloit Railroad Company, in regard to the taking of private property for the use of their road, and purporting to repeal so much of the charter as is inconsistent therewith, being void, does not operate to repeal the original charter in that respect."

In the case of *State v. Burton*, 11 Wis. 50, the court said:

"An act void because in conflict with the constitution, cannot repeal an act in conflict with the provisions of the unconstitutional act."

In the case of *People v. Tiphaine*, 3 Park. 241, the court said:

"The act entitled 'An act for the prevention of intemperance, pauperism and crime' being unconstitutional, the provisions of the Revised Statutes on the subject were left in full force, notwithstanding the clause in the act repealing all previous statutes inconsistent with its provisions."

In the case of *State v. Hallock*, 14 Nev. 202, 208, the court said:

"It is sufficient for the purposes of this case to say that it cannot be presumed the legislature would have repealed the law of 1861 without they had thought the act to be a sufficient substitute therefor; and since we are constrained to hold the principal provisions of this act unconstitutional, it follows that the repealing clauses must fall with the rest."

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From these decided cases and many other cases we might cite and the conviction that it could not have been the intention of the legislature to repeal the original act (Lan. 5538; B. 3443-3), whether the amending act was operative or not, and having already decided that the act of 1906 (98 O. L. 5) was inoperative, we now further decide that the repealing section of that act is also inoperative and the original act stands as it was prior to the attempted amendment and that so much of said act as appears in said Lan. 5538 (B. 3443-3) as relates to the requirement of heating the vestibuled space is inoperative.

It is also the opinion of the court that so much of the indictment as charges an offense against the defendant for permitting the car named therein to be operated without the heating arrangement may be regarded as surplusage and may be stricken out or disregarded.

The second claim made in argument by defendants is, that no law imposes the duty upon any of the defendants to provide the vestibuling required by the statute. With this we cannot agree.

The statute, Lan. 5538 (B. 3443-3), is mandatory in that it requires—

“That every electric street car * * * shall be provided, etc.” This certainly devolves a duty upon some one to see that the law is carried out. But the second section of said act (Lan. 5539; B. 3443-4) goes further and names those who shall be punished for the violation of the act, viz:

“Any person, agent or officer of any association or corporation violating the provisions of this act shall * * * be fined * * * for each day each car * * * is directed or permitted to remain unprovided with the screen required in Sec. 3443-3 [Lan. 5538].”

The offense created in this act may be either one of omission or commission, of omission in permitting the car to be operated without the screen, or of commission in directing that it shall be so operated. It may well be true that, as contended by defendant, the board of directors of the traction company are primarily guilty of violating the act under consideration, if it has been violated by any person. But that in no way detracts from the responsibility of the other officers or other agents of the company who, as a matter of fact, had actual control by virtue of their official duty over the operation of said car.

All of these officers and agents are presumed to know the law and, to the extent of the authority vested in them to control or manage the property of the company, each is liable for a violation of the act referred to, if said act has been violated.

The indictment charges that it was the duty of each of the defendants to carry out the provisions of the act. This is a sufficient allegation of his responsibility. Whether the charge is true that it was his duty to direct or not to permit said car to be run without the screen,

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as stated in the indictment, is a matter of fact to be proven on the trial, the same as any other material allegation and the omission to state in what manner this duty is developed upon him is not a ground for quashing the indictment nor in support of a demurrer.

The burden of proving this duty will be upon the state and if the state fails to establish it, beyond a reasonable doubt, the defendant or defendants should be acquitted.

The court therefore finds that this claim on the part of defendants is not well taken and as the court finds no error apparent on the face of the indictment the motion to quash is overruled.

In reaching this conclusion, we have taken into consideration the fact that the indictment in this case, with the exception of the insertion of the clause in relation to heating the vestibuled space, is practically an exact copy of the indictment against Samuel L. Nelson, tried in the Clark county common pleas court, and ultimately taken to the Supreme Court on demurrer, and which is reported in *State v. Nelson, supra*.

It is true that in this case the only point passed upon by the Supreme Court or raised by demurrer, so far as the record shows, was the unconstitutionality or not of the original Lan. 5538, 5539 (B. 3443-3, 3443-4). But on the theory that a demurrer searches the entire record to find flaws that are not alleged, as well as those that are, we think we may be safe in assuming that the indictment in the Nelson case was not subject to being quashed for any of the alleged defects claimed by defendants in this case or raised by them on demurrer under the guise of a motion to quash.

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ELECTIONS—MARKING BALLOTS.

[Highland Common Pleas, January, 1907.]

JAMES A. WILLIAMS v. WILLIAM S. BARKER.

1. ADMISSIBILITY OF PAROL EVIDENCE IN CONTEST OF ELECTION.

In an action to contest an election where the election officers are *functus officio*, the fact that none of the ballots in dispute were counted by the election officers may be established by parol evidence.

[For other cases in point, see 3 Cyc. Dig., "Elections," §§ 284-292.—Ed.]

2. WHAT AMOUNTS TO VOTING.

A ballot is not voted until it is deposited in the ballot box, and hence when a ballot was not deposited in the box because improperly folded, it cannot be counted.

3. VALIDITY OF BALLOT MARKED FOR TWO CANDIDATES FOR ONE OFFICE.

A ballot that is properly marked, with the exception of one particular office for which two candidates are voted, is valid, and under Rev. Stat. 2966 *et seq.* (Lan. 4534 *et seq.*) should be counted for all offices except that particular one.

[For other cases in point, see 3 Cyc. Dig., "Elections," §§ 175-181.]

4. EFFECT OF IRREGULARITY OF MARKING BALLOT.

A ballot with a straight mark or a circle within one of the circles over the several tickets does not indicate an honest desire on the part of the voter to comply with the statute in designating the ticket he desires to vote, and such a ballot should be rejected; but where the mark in the circle at the head of a ticket shows only such an irregularity as might result from an awkward use of the pencil, the ballot should be counted.

5. NECESSITY OF MARKING BALLOT AS PROVIDED FOR BY STATUTE.

Where all the tickets on a ballot except one are marked off with long cross marks extending from the top of the ticket to the bottom, and there is no cross in the circle over the ticket which is not thus erased and no crosses opposite the names of the candidates on that ticket, the ballot should be rejected for failure on the part of the voter to exhibit any intention to comply with the statute in the marking of his ballot.

6. REJECTION OF MUTILATED BALLOTS.

A mutilated ballot should be rejected, for the reason that it would afford a sure means of identifying the ballot, and there is a provision for supplying a voter with a second ballot if the first is spoiled in the marking.

7. OUSTER ACCOMPANYING JUDGMENT IN ELECTION CONTEST, WHEN.

In a contested election case, where the term of office has begun before the case is brought to trial, a finding in favor of the contestant should be accompanied by a judgment of ouster and of induction of the contestant into office.

[Syllabus approved by the court.]

Steele & Sams, for plaintiff.

G. L. Garrett and D. Q. Morrow, for defendant.

BIGGER, J.

This is a special proceeding under Rev. Stat. 2997 (Lan. 4608), *et seq.* to contest the right of the defendant to the office of infirmity director of Highland county, he having been declared duly elected to that office by the board of deputy state supervisors of elections of Highland county, on November 14, 1906.

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The statute does not provide for any pleadings in such cases, the only requirement being, that the contestor shall file a notice of his appeal from the decision of the board with the clerk of the court of common pleas, and give notice thereof in writing to the contestee, which was done in this case. This notice of appeal is in the form of a petition addressed to the court, which states that the relator is an elector of Highland county, and was such at the time of the election on November 6, 1906, and was a candidate and voted for at said election for the office of infirmity director, to which office the contestee was declared to be elected and gives notice that he will contest the election of the said William S. Barker upon the following grounds:

First. That in certain townships in said county at least six votes were legally cast for the said Williams for said office of infirmity director which were not counted for him, but were sealed up and sent to the board of deputy state supervisors of elections of said county who now have them in their possession. Then follows a statement of the townships and the votes claimed to have been cast in each for the relator.

Second. The relator states that the board of deputy state supervisors of elections of Highland county found and declared that the said James A. Williams and William A. Barker at said election each received 3,087 votes, but did not include and count in the vote for said James A. Williams the six votes so as aforesaid cast for him.

Third. The relator further states that the said James A. Williams received at said election a majority of all the lawful votes cast for said office of infirmity director and was and is the duly elected infirmity director of said Highland county.

The relator prays that the finding and declaration of the board of deputy supervisors of elections of Highland county may be reviewed and inquired into and set aside and held for naught, and that the said James A. Williams may be declared to be duly elected to said office, and that the court make such order and decree and award such process as may be proper and necessary in the premises.

The contest is over the validity of these disputed ballots which were sealed up by the election officers in accordance with the statutory requirement and returned to the board of deputy state supervisors of elections. There is some informality and want of compliance with the statute on the part of the election officers in making the return of these ballots, but it is stipulated and agreed between the parties to this contest, that, if it is competent to prove this fact by parol evidence, none of these disputed ballots in question were counted at the election. The election officers are now *functus officio*. That being true, that such fact may be established by parol evidence is, I think, established by the authorities. *Phelps v. Schroder*, 26 Ohio St. 549; *State v. Conser*,

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24 O. C. C. 270; *Sinks v. Reese*, 19 Ohio St. 306 [2 Am. Rep. 397]; Wigmore, Evidence Sec. 1351.

These disputed ballots are eleven in number, marked for identification as exhibits A, B, C, D, F, G, I, J, K, M and O. Exhibit J is marked in the circle at the head of the socialist labor ticket, and as there are no other marks upon the ballot, it cannot be counted for either the contestant or contestee and may, therefore, be passed without further notice.

I notice next the ballot marked exhibit O. The stub still remains upon this ballot and the evidence shows that it was never deposited in the ballot box. As to this ballot, the evidence is substantially this: The voter, James Morgan, whose name appears upon the stub, was an inmate of the county infirmary, and presented himself at the polling place and obtained a ballot from the election officers. He retired to a voting booth and returned therefrom with the ballot folded so as to conceal the facsimile of the signatures of the election board, and with the printed ballot on the outside. He was directed to return to the booth and properly fold his ballot. He re-entered the booth and again returned and presented the ballot improperly folded. The evidence is not very clear as to the number of times he returned to the booths on direction of the election officers, but apparently three times at least. The undisputed evidence is, that the last time he presented his ballot to the judge, he was informed that it was not properly folded, and that he thereupon threw it toward the judge saying that he did not have time—one of the judges testifying that he also said he could not fold it right, and went out of the polling place. The witness, Van Zant, one of the judges, testifies that the ballot was properly folded the last time except that the stub was folded in with the ticket with a small corner of the same projecting.

Upon this evidence, I am of opinion this ballot cannot be counted. It was the duty of the voter when directed to fold his ballot properly. The stub being folded in with the ticket would require some one to open the folded ticket to detach the same, and this the election officers had no right to do. But beyond all that the voter did not dispute the statement of the judge that his ballot was improperly folded, but apparently recognizing that fact, desisted from the attempt to vote, saying that he did not have time, and when he returned the ballot to the election officers he did only that which the law required of him in case he did not vote the ballot. Laning 4536 (B. 2966-37).

The voter did not ask the assistance of the election officers in marking his ballot, and the evidence does not show that he was entitled to such assistance. The evidence tends to show he was a man of low mentality, but it is only physical infirmities rendering the elector unable to mark his ballot that entitles him to have the assistance of the

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election officers under the statute. He marked his ballot but did not properly fold it, and returned it to the election officers without having voted. His statement that he did not have time, and that he could not fold it right shows that he desisted from the attempt to vote.

Furthermore, Sec. 22 of the act as amended at the last session of the legislature, provides:

"When any person shall have received an official ballot from one of the election officers and shall have delivered the same to the election officer having charge of the ballot box at the time, and when such ballot has been deposited in the ballot box, such person shall be deemed to have voted."

I conclude, therefore, that this ballot cannot be counted.

I next consider the ballots marked B and G, as in my opinion their validity depends upon the same considerations. The ballot marked B contains a cross in the circle at the head of the Democratic ticket, and also a cross at the left and opposite the name of Oliver Newton Sams, the Democratic candidate for common pleas judge, and also at the left of, and opposite, the name of Cyrus Newby, the Republican candidate for common pleas judge. There are no other marks upon the ballot.

The ballot marked G for identification, contains a cross mark in the circle at the head of the Democratic ticket and also a cross mark in the circle at the head of the Socialist ticket. These are the only marks upon the ticket. Upon the Socialist ticket there is a full list of candidates for state offices and a candidate for congress, but no candidates for county offices.

In my opinion these two ballots must be counted for the contestant. Our statute provides Lan. 4534 (B. 2966-35), that—

"If the elector mark more names than there are persons to be elected to an office * * * his ballot shall not be counted for such office."

In the ballot marked B the elector voted for more names than there were persons to be elected for the office of common pleas judge. In the ballot marked G, the voter voted for more names than there were persons to be elected for each state office and for representative in congress. The cross in the circle was a vote for every candidate appearing on that ticket. But the statute in such case provides that such ballot shall only be rejected as to that office, and this plainly evidences the intention of the legislature that as to other offices on the ticket it shall be counted. This exact question does not seem to have been decided in this state so far as appears from the reports, but the exact question was decided by the supreme court of California under a statute containing the same provision. The California statutes provides:

"If the voter marks more names than there are persons to be elected to an office, his ballot shall not be counted for such office."

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It will be observed that the language is identical except that the Ohio statute uses the word "elector" where the California statute uses the word "voter."

In the case of *Day v. Dunning*, 127 Cal. 55 [59 Pac. Rep. 196], the court decided:

"Ballots cast for an excessive number of names for one office have only the effect under Sec. 1211 of the political code to prevent the ballots from being counted for that office, and such excessive number of votes for one office, does not constitute an identifying mark within the meaning of Sec. 1215 of the same code, and does not destroy the validity of the ballot or effect it insofar as properly cast for candidates for other offices.

"The fact that the vote for an excessive number of names for one office might be used as an identifying mark does not affect the validity of the ballot in respect to other offices, such identifying marks being relieved from the operation of Sec. 1215 of the political code by virtue of the more specific provision of Sec. 1211 of that code, which is a limitation upon Sec. 1215."

The California statute, Sec. 1215, provides:

"No voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him."

In the opinion in the above case it is said:

"Section 1211, by all rules of construction, is susceptible of but a single meaning. It means that the ballot must be rejected, as to the particular office, where more than the number of names allowed by law are voted for that office, and that it must be counted as to all other names for all other offices. This is as plain as though it were declared in direct and positive language. The statute means this, or it means nothing."

To the same effect is the decision of the supreme court of Indiana, in the case of *Borders v. Williams*, 155 Ind. 36 [57 N. E. Rep. 527], and of the supreme court of Illinois, in the case of *Parker v. Orr*, 158 Ill. 609 [41 N. E. Rep. 1002; 30 L. R. A. 227]. In the case of *Caldwell v. McElvain*, 184 Ill. 552 [56 N. E. Rep. 1012], it was decided:

"Where two only of the five tickets printed upon the ballot have a candidate for a certain office, a ballot marked with a cross in the circle at the head of each of such two tickets cannot be counted for either candidate. But where the crosses marked are in the circle at the head of one of the tickets having a candidate for such office, and one or more which have not, the ballot may be counted for such candidate."

The voter not having voted for more than one name for the office of infirmary director on either of these ballots, and that name being that of the contestant, James A. Williams, I find that these two ballots should be counted for him.

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There are two ballots marked exhibits C and I, which are marked in the same manner, viz., with a straight mark in the circle at the head of the ticket, the ballot marked, for identification, C having the straight mark in the circle at the head of the Democratic ticket, and the ballot marked I, having the straight mark in the circle at the head of the Republican ticket. Insofar as the result of this contest is concerned, it is immaterial whether these two ballots be counted or not, as one is cast for the contestant and the other for the contestee. Their validity depends upon the construction to be given to our statute. The statute provides that the "elector shall observe the following rules in marking his ballot." Then follow the specific directions for marking a ballot, the requirement being that a cross shall in all cases be used to indicate the voter's intention. Manifestly it was the object and purpose of this requirement that all voters should be required to make the same kind of a mark upon the ballot so as to carry out the purpose and object of securing a secret ballot and to prevent bribery and intimidation. If it is optional with the voter to use some other kind of a mark than a cross mark, then he may use any mark whatever, so that it be placed in the proper position, and it is manifest that to permit this latitude would result in practice in defeating the primary object of the Australian ballot law, which is to secure a secret ballot. It is true our statute contains the provision that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. But clearly this must be construed with the other provisions of the law and construed in the light of the controlling object and purpose of the Australian ballot law. If the intent of the voter alone is to be the guiding star, then what is there to prevent a voter from writing on his ballot, "I desire to vote for every name on the Republican ticket" or "the Democratic ticket?" Such a system would clearly defeat the very object and purpose of the law. Is such a mark as this to be regarded as a technical error which is to be disregarded if the intent of the voter can be arrived at? I do not find any reported case in this state involving this question, but it has been before the courts of other states under provisions substantially like our own statute. I find that the Australian ballot laws in all the states, so far as I have examined them, contain a provision substantially like our own, that effect is to be given to the intention of the voter where it is possible to arrive at it. The statute of Minnesota provides:

"In the counting of ballots cast at any election, all ballots shall be counted for the persons for whom they were intended so far as such intention can be clearly ascertained from the ballot itself."

In the case of *Truelsen v. Hugo*, 81 Minn. 73 [83 N. W. Rep. 500], the supreme court of that state decided:

"The intention of a voter, under our election law, must control

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in counting his ballot; but such intention must be shown and indicated by markings on the official ballot substantially in the manner provided by such law, and in *bona fide* attempt at compliance therewith."

In the opinion the court said:

"While the statute is careful in requiring effect to be given the intent of the voter, all the provisions on the subject are pregnant with the idea that such intent must be expressed and indicated by a compliance with the manner and method therein provided for marking the ballots."

The court further said:

"If the intent of the voter is to control, regardless of the manner of indicating it, then there need be no attempt to comply with the requirements of the statute at all. Such is contrary to the purpose and intent of the law, and we adopt the view that the intent of the voter, to be effective, must be indicated and expressed substantially in the manner as provided by statute, or at least in a *bona fide* attempt at compliance therewith."

In the case of *Parker v. Orr*, *supra*, the supreme court of Illinois decided:

"An honest attempt to follow the directions of the law requiring a cross to be made in the proper margin or place opposite the name on the ballot, must appear in order to permit the ballot to be counted. Writing the word "Democratic" at the head of the ticket, making a single mark through the circle or square, making a circular or other irregular character (not being the form of a cross) within the circle or square, making a cross opposite the names, but outside the square, and signing the name of the voter to the ballot are all modes of marking which disregard the directions of the law, besides destroying the ballot's secrecy, and ballots so marked should be rejected."

In *Vallier v. Brakke*, 7 S. D. 343 [64 N. W. Rep. 180], it was decided by the supreme court of that state that—

"A straight diagonal line at the left of the name of a candidate does not constitute a cross, and should be disregarded.

"One or more circles within the circle at the head of a party ticket do not constitute a cross within the circle, and should be disregarded."

In the opinion the court says:

"The cross is the distinguishing mark in our Australian ballot system, and we think it would be going too far to hold that a circle could be substituted for the cross prescribed by the statute. It may have been the intention of the voter to substitute a circle for the cross, but the law permits no such substitution. If the voter desires to have his vote counted he must substantially comply with the law."

In the case of *Kelly v. State*, 79 Miss. 168 [30 So. Rep. 49], it was decided:

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"Under code of 1892, Sec. 3664, providing that the name of the person voted for on a ballot, shall be marked with a cross, the use of two crosses to designate the name of the person voted for does not invalidate the ballot. Under said statute, ballots on which the voter's choice is sought to be indicated by a straight mark opposite the name or by erasing a name should not be counted. The statute intends a cross only to indicate the choice of the voter."

The authorities seem to be practically in accord on the proposition that the elector must use a cross to indicate his intention, or at least it must be apparent that he was honestly endeavoring to make the mark which is prescribed by the statute as the proper mark to indicate his intention. If we depart from this statutory requirement and hold that some other mark will answer as well, it is difficult if not impossible to prescribe any limits to such departure from the statute. I am therefore compelled to reach the conclusion that these two ballots should not be counted.

The same reasons, it is apparent, will exclude the ballot marked for identification exhibit D, and which is marked with a circle within the circle at the head of the Republican ticket. This ballot must for the same reasons be rejected.

I next come to the consideration of the ballot marked for identification exhibit K, which is marked in the circle at the head of the Democratic ticket, and contains no other marks. This mark is something more than a cross. It is composed of three straight marks in one direction and two straight marks at right angles therewith and crossing the three marks. I have reached the conclusion that this ballot must be counted. There is here a cross, but the voter has for some reason repeated the operation. The intention of the voter here is plain, and as he has apparently tried to follow out the statutory requirement with reference to voting a straight ticket, the ballot should be counted as a straight Democratic ballot.

There is no reported case in this state in which this question has been before the courts for decision, but there are a number in other states and the clear weight of authority in such case is that such the ballot must be counted. It is to be remembered that many voters are unused to the use of a pencil and are awkward in its use, that the light is often times dim in the voting booth and that the vision of many voters is poor, so that to require great exactness or nicety in the making of the cross would result in disfranchising honest voters.

In the case of *Parker v. Orr*, *supra*, the supreme court of Illinois held:

"Imperfect success in making the cross in the proper place to indicate a choice of candidates where there was a clear intention to con-

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form to the statute and not to distinguish the ballot will not require its rejection."

In this case there was more than a cross, there being two marks in one direction and one mark crossing them, and it was held the ballot should be counted.

In the case of *Houston v. Steel*, 98 Ky. 596 [34 S. W. Rep. 6], it was decided:

"Ballots marked with two or more crosses in one square, or with a cross of a peculiar form, should be counted if otherwise regular as these are not such distinguishing marks as invalidate the ballot in the absence of evidence of intent to distinguish it."

In that case there was one ballot marked with three crosses in the circle, which was regarded apparently as only three attempts to make a cross.

In *People v. Kamps*, 129 Mich. 217 [88 N. W. Rep. 475], it was decided:

"Election ballots which appeared as though the voter had first made a cross in the circle, and thinking he had not marked it plainly enough, repeated the marking substantially over the first, and others which appeared as though the cross might have been made with a pencil the lead of which was so broken that it had two points, or on which the voter may have made a cross with a down and up stroke in making each mark, were properly counted."

The court in the opinion said:

"If these ballots were to be rejected, the ballots of many voters who do not use pen or pencil very often would have to be rejected."

To the same effect are the following cases: *People v. Morgan*, 20 N. Y. App. Div. 48 [46 N. Y. Supp. 898]; *State v. Fawcett*, 17 Wash. 188 [49 Pac. Rep. 346]; *Kelly v. State*, 79 Miss. 168 [30 So. Rep. 49]; *Tandy v. Lavery*, 194 Ill. 372 [62 N. E. Rep. 774].

This ballot being marked in the cross at the head of the Democratic ticket must be counted for the contestant.

This leaves for consideration the ballots marked for identification, exhibits A, M and F. As to these three ballots I am in doubt. It is immaterial what the decision be, however, as to their validity, as it cannot affect the result, even if the one which is claimed for the contestee be counted, exhibit M, the other two, if counted at all, being Democratic ballots. I am clearly convinced that exhibits B, G and K must be counted for the contestee under the provisions of our statute and the decisions above cited. I also feel clear that the exhibits C, D, I and O cannot be counted for the reasons stated, which would give to the contestee a majority of three votes which cannot be affected by the decision as to these three ballots.

Exhibit A contains a cross mark in the circle at the head of the

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Democratic ticket, and a cross mark at the left and in front of the blank space on the Socialist ticket, marked for county commissioner, there being no candidates for county offices on the Socialist ticket. This ballot, to my mind, has all the ear marks of a fraudulent ballot marked for identification. I have much doubt as to whether or not this is a technical error which is to be disregarded under the terms of the statute. The intention may be clear, but it is equally true this ticket is so marked as to readily identify it from other ballots which defeats the object and purpose of the Australian ballot.

* The supreme court of Illinois, in the case of *Parker v. Orr, supra*, decided that:

"The use of a mark furnishing means of avoiding the secrecy of a ballot requires its rejection, though the law contains no direct prohibition of distinguishing marks, and this is so even though the mark used may indicate the voter's candidate or party choice."

The statute of Illinois, like our own, contains a provision that where it is impossible to determine the voter's choice, the ballot shall be rejected. For these reasons I think this ballot should be rejected.

As to the ballot marked O, all of the tickets upon the ballot, except the Republican ticket, are marked off with a long cross mark extending practically from the top to the bottom of the tickets, but no mark of any kind is placed upon the Republican ticket, either in the circle or at the left and before the names of the several candidates thereon.

The supreme court of Minnesota, *Truelsen v. Hugo, supra*, decided that under the Australian ballot law such a ballot could not be counted. It was held in that case that—

"The intention of a voter, under our election law, must control in counting his ballot; but such intention must be shown and indicated by markings on the official ballot substantially in the manner provided by such law, and in *bona fide* attempt at compliance therewith."

The court says on page 78:

"Exhibit 34 was properly rejected. There was no attempt at a compliance with the statutes on the subject of marking, and it could not properly have been counted. The only marks on this ballot are those erasing the name of contestee, the name of the Socialist labor candidate, and the names of the Republican and Socialist candidates for aldermen, leaving the Democratic candidates alone on the ballot, but without any attempt to place a mark of any kind opposite their names."

I therefore reject this ballot as not being a compliance with the law and not indicating the intention of the voter to vote the Republican ticket, he having neither marked his ballot nor attempted to mark it, as required by the statute.

As to the remaining ballot, it is mutilated by an attempted erasure of names on it. This is also rejected. The statute provides for issuing

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additional ballots in case the voter spoils his ballot and such a marking would be a sure means of identifying the ballot from others.

The result arrived at, therefore, gives to the contestant three votes, which gives him a total vote of 3,090, as against 3,087 for the contestee. I therefore conclude upon the evidence and the law that the contestant received a majority of the legal votes cast for this office and was and is duly elected to the office of infirmary director of Highland county, and such is the judgment of the court.

Furthermore, as under the law the term begins on the first Monday of January, which would be the seventh day of January, and as the supreme court has held that this remedy is exclusive and that quo warranto cannot be maintained, I am of opinion a judgment of ouster should be entered and of induction of the contestant into the office. The costs under the statute are assessed against the contestee, including the cost of the depositions. Exceptions may be noted by either party.

MUNICIPAL CORPORATION—PUBLIC LANDINGS.

[Superior Court of Cincinnati, General Term, October 20, 1906.]

Ferris, Hosea and Murphy, JJ.

(Judge Murphy of the Hamilton common pleas, sitting in place of Judge Hoffheimer.)

LOUISVILLE & NASHVILLE RY. ET AL. V. CINCINNATI (CITY).

1. RIGHT TO CONSTRUCT VIADUCT OVER PUBLIC LANDING.

A municipal council is without power to authorize a railroad company to occupy a street or public landing with an overhead structure, resting upon fixed permanent supports, necessarily involving the exclusive use of the grounds so occupied, and an ordinance granting the right to erect such a structure is void.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 2296-2386; 7 Cyc. Dig., "Railways," §§ 252-291.—Ed.]

2. NATURE OF USE OF PUBLIC LANDING.

While from the purposes of its creation and dedication, a public landing includes the free and unobstructed passage of travelers and vehicles, its function is much broader and more important than that of a mere street, and considerations which would forbid the occupation of a street by a railway structure are of commanding application in the case of such a landing.

[Syllabus approved by the court.]

ERROR to special term.

Kinthead, Rogers & Ellis, for plaintiffs in error.

Jesse Lowman, city solicitor, and W. A. DeCamp, assistant city solicitor, for defendant in error.

HOSEA, J.

This proceeding is brought to review and reverse the judgment and order of the trial court at special term, denying a motion to dissolve a

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temporary restraining order theretofore granted, to prevent the Louisville & Nashville Railroad Company and the American Bridge Company from constructing a railway viaduct across the grounds known as the "public landing" in the city of Cincinnati. All the questions presented in argument upon the hearing in this court, were presented to the consideration of the court below, and are fully discussed upon the authorities in the opinion delivered by that court and reported in *Cincinnati v. Railway*, 16 Dec. 628.

We have given all these questions and the arguments of counsel in relation to the same our careful consideration, and the conclusions reached by us are in accord with the views and findings of the court below. We think that the city council was without power, under existing laws, to authorize a railroad company to occupy the public landing with a structure of the character shown in this case, resting upon fixed permanent supports, which necessarily involves an exclusive use of the grounds so occupied, and that consequently the ordinance is void.

While the reasons and citations of authority given by the court below in its published opinion are so full and satisfactory, as to render a further statement of them unnecessary here, there are additional reasons for the finding that may with propriety be mentioned, based upon facts of which judicial notice may be taken, insofar as they are not specifically included in the record.

The "public landing" is a portion of the river bank, graded to a substantially uniform slope from the first "bench" down to low water line of the Ohio river. This tract extends from east to west along the river; approximately one thousand feet, on Front street, its width varying according to the stages of water in the river, being considerably greater at the west side at the projected line of Main street than at the east side at the projected line of Broadway, but an average at extreme low water of, say, seven hundred and fifty feet. This tract was set apart and dedicated by the founders of Cincinnati as a "public landing," and is the sole public wharf or landing place of this character possessed by or available to the city, and has been in public use for this purpose from a period beyond the memory of those now living.

The special purpose of its dedication was and is, to afford, by means of its long slope, a safe and convenient landing place for freight and passenger boats at all stages of the river, from extreme low to extreme high water, where at all times (excepting during unusual floods completely submerging it) boats may land and receive and discharge their cargoes with convenience and safety. An important part of its general function also, is to afford opportunity for wagons to approach the water's edge from the business portions of the city, bringing goods to the boats for shipment and hauling away the discharged cargoes—the slope affording an opportunity for teams to attain easy grades for heavy loads by selecting at will, paths of travel to and fro, at any desired angle to the line of

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the slope. It is, therefore, properly speaking, not a "street." While the purposes of its creation and dedication include the free and unobstructed passage of travelers and vehicles, its function in this respect is much broader and more important than that of a mere street, by reason of its connection with the landing of boats, the handling of cargoes, and the consequent necessity of entire freedom in selecting paths of travel for haulage at any angle with the slope. In a general sense, the function of the public landing as a place for unloading cargoes is analogous to that of automatic landing stages which rise and fall with the tide. The Ohio river is subject to frequent changes of elevation, which recur with more or less regularity within wide limits, and for which the slope of the landing affords ample provision. As the river rises, the boats land nearer the upper limit of the slope, but that portion which remains above water still retains *pro tanto* all the functions of the whole.

It is apparent that a fixed structure such as a railway viaduct resting upon a line of piers or abutments extending from east to west upon the slope of the public landing, parallel with the river, while at low stages of the water it might be simply an inconvenience to the public use of the landing, would be absolutely prohibitive of such use whenever the water reached the vicinity of the line of abutments, and at all stages beyond. If teams were compelled to pass between piers or under archways to reach boats, there must be room enough below to turn and get into position to load and ascend the slope again, and this could not be done when the water approached near to the line of the viaduct; and, certainly, interchange of freight between wagons and boats would not be possible at all at higher stages of the water. At such times the entire upper part of the slope would be entirely cut off by such a structure as that in question, from its intended use. It is thus clearly apparent that the extent of the destruction of public rights in the premises is not to be measured by the mere spaces occupied by piers, but is co-extensive with the existence of the proposed structure as a whole, which under frequently recurring conditions would effectually destroy the entire use of the public landing as such.

These facts and the great detriment to the public interest that would inevitably ensue from the proposed construction of the railway viaduct, and especially in view of the improvements in the navigation of the Ohio river now under way and the stimulus to the shipping interests of Cincinnati so generally expected to arise therefrom, may well be set off against the argument so strenuously urged in this court based upon the large expenditure made and to be made by the railroad company in the construction of the viaduct, and the loss to ensue to them in case of its completion be not permitted. The exclusive occupancy of a street in a city is usually at most an inconvenience merely, because other streets supply the means of travel between the same points. In this case, however, the destruction of the public landing for its intended use would

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inflict a loss upon the city that would be very great and would also be irreparable, for there is no available substitute.

These facts and considerations also suggest the entire inapplicability of Lan. 5305 (B. 3337-1), as amended April 21, 1904 (97 O. L. 302), to the case in hand, as vesting in the city council authority to pass the ordinance in question. That section has exclusive reference, in terms, to the crossing of streets, and it is clearly apparent from its reading that the lawmakers had in view a bridge crossing ordinary streets from side to side, and that only. By no reasonable or possible construction can it be held to intend or include a public landing of this character which obviously is not a street in any such sense as contemplated by the statute in question. But even if this were not so and a power exists by virtue of the statute authorizing councils to agree with railroad companies as to the manner of occupation of streets, still, such power must be taken with the limitation existing in the fundamental law originating in the purposes of the dedication to public uses and formulated in the code provision requiring councils to keep such property free from nuisance. To hold otherwise would give to the statute from which the power is claimed to arise in this case by implication, the effect of repealing, by the same implication, the prior and explicit statute declaring the fundamental law. This we cannot do. Even if it could be done, we would be relegated at last to the question of abuse of the discretionary power thus vested, and we would still be compelled, upon the facts of this case, to hold the grant void as a palpable abuse of discretion. The question whether or not a structure in public streets is or is not a nuisance, is, and must always be, a judicial question, and no action of the legislature can oust the courts of their power of determination in this regard, by giving authority to council. We are, therefore, of opinion that, for the reasons here stated, in addition to those pointed out in the opinion of the court below, the judgment denying the motion to dissolve the injunction was correct and should be affirmed, and it is so ordered.

Judgment affirmed.

Ferris, J., concurs.

MURPHY, J.

I concur in the judgment of affirmance of the judgment of the court below. The reason assigned in the above opinion, beginning at the last paragraph on page 691 was not before the court and therefore I pass no opinion thereon.

Huber v. Railway & Term. Co.

NEGLIGENCE—PLEADING.

[Superior Court of Cincinnati, Special Term, March, 1907.]

GUSTAVE HUBER v. INTERURBAN RY. & TERM. CO.

SUFFICIENCY OF ALLEGATION OF NEGLIGENCE.

Allegations of the negligent operation, and negligence in the equipment, of a railroad, resulting in the injuries complained of, must be averred with such definiteness as to show the defendant the precise nature of the charge, and must be drawn with such precision as to connect the acts complained of with the injuries sustained.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 489-518.—Ed.]
[Syllabus approved by the court.]

Hoffman, Bode & Le Blond, for plaintiff.

F. F. Dinsmore and C. M. Leslie, for defendant.

HOSEA, J.

This being an action for injuries to a passenger, it is alleged (1) that the defendant was wilfully negligent in the operation of its line in allowing a switch to be unlocked and open, and (2) that the car was operated negligently and at a negligent rate of speed, whereby the car ran into and off the switch and was overturned.

Coupled with these are allegations that there was negligence in the equipment of the switch and in the equipment of the car; but it does not appear what those defects are or that they are in any way connected with the injury in the relation of cause and effect. It is necessary that this relation be shown and this cannot be done without specifying the defect. A defendant is entitled to know not only the nature of the charge of negligence against him but the "precise nature of the charge." Practice Code (Rev. Stat. 5088; Lan. 8603). This means, in an action for negligence, that the acts of negligence are to be "specifically and definitely averred in the petition." *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326 [64 N. E. Rep. 130]; *Balt. & O. Ry. v. Lockwood*, 72 Ohio St. 586, 590 [74 N. E. Rep. 1071]; *Davis v. Guarnieri*, 45 Ohio St. 470 [15 N. E. Rep. 350; 4 Am. St. Rep. 548].

But a "charge of negligence" relates not only to the negligent acts but their results also. It does not follow in a logical relation of cause and effect that injury results from negligent acts; consequently the damages claimed to result are necessarily special and must be specifically laid and proved. The statutory requirement includes the specification of injuries which the defendant is charged with causing as well as the acts of commission or omission that constitute the predicate of his negligence in causing them.

Inasmuch as such damages are inherently special and not general it is necessary, in order to prevent surprise to the defendant, that the

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declaration state specifically and in detail the damages sought to be recovered. As applied to actions for personal injuries it means that those facts shall be stated specifically so that there shall be no uncertainty as to the effect which the injury produced. *Illinois Cent. Ry. v. Cheek*, 152 Ind. 663 [53 N. E. Rep. 641]; *Hanson v. Anderson*, 90 Wis. 195 [62 N. W. Rep. 1055].

In the present case adherence to the rule is more necessary, because the allegations all relate indefinitely to "internal injuries," which are alleged to be of a permanent nature, making the wife, for whose injury the action is prosecuted, an invalid for the rest of her life, entailing loss of services and continued expense, and because the action is brought three years after the occurrence implying abundant time to ascertain exact conditions.

While there is much laxity in other states on this point—one court holding an allegation that plaintiff was "greatly disturbed in her body" to be a sufficient averment of physical injury (*Watkins v. Manufacturing Co.* 131 N. C. 536 [42 S. E. Rep. 983; 60 L. R. A. 617])—our code rule above cited and the recognized practice in Ohio requires a specific and definite averment.

It follows that in both instances cited in the motion, to wit, (1) in relation to the defects of "equipment" of switch and car, and (2) in relation to the injuries suffered, the petition is indefinite and the motion is well taken.

Motion granted with leave to amend within ten days.

McClure v. Collopy.

CONTRACTS—MECHANICS' LIENS.

[Superior Court of Cincinnati, January 2, 1907.]

Ferris, Hosea and Hoffhelmer, JJ.

F. F. McCLURE & SONS CO. v. J. G. COLLOPY & CO. ET AL.

1. RELATION TO CITY OF SUBCONTRACTOR FURNISHING PAVING MATERIALS.

A contract to furnish paving materials to another who has contracted to do certain paving for a municipality, and such other's paving contract with the municipality are entirely independent of each other, and the former cannot file a subcontractor's and material man's lien, after four months from the last delivery under his contract but within four months from the completion of the pavement.

[For other cases in point, see 6 Cyc. Dig., "Mechanics' Liens," §§ 29-102.—Ed.]

2. WHO IS SUBCONTRACTOR ON PAVING CONTRACT.

Whether one furnishing material to a paving contractor is of a class covered by the statute and might have taken a valid lien, had it been filed within the statutory time after the last deliveries, *quaere?*

[Syllabus approved by the court.]

ERROR to special term.

David Davis and Frank Dinsmore, for plaintiff in error.

W. W. Symmes, for defendants in error.

PER CURIAM.

This case, as it seemed to us, is susceptible of disposition upon elementary principles. The defendants in error, Collopy & Company, anticipating a contract with the city of Cincinnati to construct Queen City avenue, entered into contract in writing with the plaintiff in error, whereby the latter agreed to furnish and deliver to the defendants in error all the granite needed by them in the completion of their said contract with the city. The granite so to be furnished was to equal certain samples and to be delivered f. o. b. on cars at Cincinnati as the work progressed, and the quantity delivered in any month was to be paid for on the fifteenth of the next succeeding month. It is conceded that deliveries were made on cars at Brighton station, Cincinnati, and there inspected by a city inspector, and hauled by Collopy & Company to and used by them upon the work. No question is made but that McClure & Sons Company delivered granite as stipulated in a total quantity sufficient to continue and complete the work, and that the last deliveries were made a considerable time prior to the actual completion of the avenue by Collopy & Company, and no question is made as to quality. Much more than four months after the last delivery, the plaintiff in error filed a subcontractor's and material man's lien, and the claim is made that it was filed within four months after the final completion of the work by Collopy & Company, and it is claimed to be within the statutory time, by reason of the supposed connection between the contract above cited and Collopy's contract with the city.

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In our opinion this proposition of the supposed connection of these two contracts, in aid of the contention that the lien was filed in time, is not tenable. The two contracts are, in our view, entirely independent. Whether McClure & Sons Company are of the class intended by the statute, and might, therefore, have taken a valid lien if within the statutory time after their last deliveries, is not necessary for us to decide. Their attempt to file a lien was made long after any right in that connection, if such existed, expired. We think the court below was right in holding the lien void and entering judgment dismissing the petition; and the same should be affirmed, and it is so ordered.

Judgment affirmed.

CORRUPTING COURTS—CRIMINAL LAW.

[Franklin Common Pleas, April, 1907.]

STATE OF OHIO V. JOHN W. JOHNSON.

ACTS OF IMPROPRIETY NOT CONSTITUTING ATTEMPT TO CORRUPT COURT.

Sending a letter to a judge of the courts reflecting on the personal character of a person who is a party on relation in a civil action then pending before said court, does not state an offense under Rev. Stat. 6907 (Lan. 10541), for corruptly endeavoring to influence an officer of a court of this state. The character of such relator not being an issue in the pending case, there is nothing in the letter concerning the merits of such pending case,

[Syllabus by the court.]

DEMURRER.

C. T. Webber, prosecuting attorney, for plaintiff.

G. J. Marriott, E. T. Belcher and J. A. Conner, for defendant.

EVANS, J.

This case is submitted on a demurrer to the indictment, and among other things, the question is raised as to whether the words and discourse written and sent to said judges, if they were so done by the defendant, are sufficient to state the crime of endeavoring to influence corruptly the judges of said court in the discharge of their duty in the decision of said case then pending before them.

The indictment is drawn under Rev. Stat. 6907 (Lan. 10541) which provides among other things that whoever corruptly endeavors to influence an officer in any court of this state, in the discharge of his duty, shall be fined, etc.

The words and discourse alleged to have been written and delivered to said judges, are as follows:

"I note by the papers that Slater v. Johnson case is up to you. I am a Republican, as you gentlemen are, and I hope I am a good citizen. and I would not even suggest to you that you should in any manner

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violate your oaths of office or in any manner stultify yourselves in this or any cause of action that comes before you, but I would suggest that it is your duty to search very diligently to find a lawful reason to prevent such a man as Mark Slater's going back into the office he has abused and disgraced—from which, there is not the least doubt in this world he has stolen thousands of dollars. The man has no moral perception and seems to believe that he has a perfect right to graft all he might on the side. The Republican party, as you are well aware, has load enough to carry for the present without loading up again with a Slater.

“Yours Respy.,

“E. T. RYAN.”

The question here is, Do said written words and discourse to the disparagement of said Mark Slater, amount in law to a corrupt endeavor to influence said officers in their decision in said pending case?

It will be observed that the indictment charges expressly that the written words and discourse to the disparagement of said Slater, plaintiff in said cause, constitutes the matter therein that was written for the corrupt purpose of influencing said officers in their said decision in said case:

This being specifically so charged eliminates the other matter so written, and, in fact, the remaining part could not so operate.

Corruption is defined by Bouvier to be: “An act done with an intent to give some advantage inconsistent with official duty and the rights of others.”

Anderson defines it, as—“An act done with intent to gain an advantage not consistent with official duty and the rights of others; something forbidden by law.”

It is said in 1 Bishop, Criminal Law Sec. 468:

“It is in like manner punishable at the common law to endeavor, by indirect means, to influence the judge or jury concerning the merits of a cause on trial or on the eve of trial; as, by circulating papers respecting its merits.”

So that the whole question here is narrowed down to a consideration of the fact whether the objectionable matter written in disparagement of said Slater concerns the merits of said case; that is, was, or rather could the question of the character of Slater be an element or issue in said case, and could it therefore be a matter for consideration of said court in deciding the issues of said cause on its merits?

While the indictment does not, of course, set forth what the issues in said pending case were, yet, it does show that said case was a civil and not a criminal case, and it further shows that said Slater was not as an individual a party to said case. The state was the party plain-

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tiff, and said Slater the relator, as any others might have been who might bring the action in the name of the state on relation.

So that, as laid down by 1 Greenleaf, Secs. 54 and 55, and other authorities, the character of said Slater could not have been an issue in said case, and whether his character was good or bad could have had no influence on the court, in deciding said case, because that had nothing to do with the merits of the case.

While the writing of such a discourse to a judge is the height of impropriety, and might subject such person on a proper hearing to punishment for contempt of court,—a matter, however, upon which I do not here express an opinion,—I am of the opinion, for the reasons above stated, that it does not state a crime under the penal statute above cited.

It is not necessary to pass on the other objections made, and for the above reasons, the demurrer to the indictment is sustained.

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SUBROGATION—PRINCIPAL AND SURETIES.

[Defiance Common Pleas, June 25, 1906.]

J. H. GARES v. E. F. STEVER.

DEBTOR SURETY OF DECEDENT CANNOT COMPEL CONTRIBUTION FROM COSURETY FOR MORE THAN MOIETY OF BALANCE OF DEBT PAID ESTATE.

One, who, being surety with another for an insolvent decedent, and at the same time debtor to said decedent's estate, succeeds in having the whole amount of his debt to the estate applied to the reduction of the decedent's debt upon which he is one of the sureties, and then pays the balance thereof in money, cannot compel contribution of his cosurety for more than a moiety of the amount actually paid in money; whatever advantage he gains by the application of his own debt inures to the benefit of his cosurety.

[For other cases in point, see 7 Cyc. Dig., "Principal and Surety," §§ 506-527.—Ed.]

[Syllabus by the court.]

J. H. Hockman and Harris & Cameron, for plaintiff:

Contribution. Swan's Treatise (13 ed.) 587, 588; *Camp v. Bostwick*, 20 Ohio St. 337 [5 Am. Rep. 669]; *Oldham v. Broom*, 28 Ohio St. 41; *Gaster v. Waggoner*, 26 Ohio St. 450; *Leggett v. McClelland*, 39 Ohio St. 624; *Robinson v. Boyd*, 60 Ohio St. 57 [53 N. E. Rep. 494]; *O'Brien v. Karing*, 57 N. Y. 649; *Gillespie v. Torrance*, 25 N. Y. 306 [82 Am. Dec. 355]; *McBride v. Vance*, 73 Ohio St. 258; *Davis v. Corwine*, 25 Ohio St. 668.

Collateral attacks. *Glover v. Ruffin*, 6 Ohio 255; *Smith v. Pratt*, 13 Ohio 548; *Adams v. Jeffries*, 12 Ohio 253; *Bigelow v. Bigelow*, 4 Ohio 138 [19 Am. Dec. 591]; *Buell v. Cross*, 4 Ohio 327; *Douglass v. McCoy*, 5 Ohio 522; *Foster v. Dugan*, 8 Ohio 87 [31 Am. Dec. 432]; *Boswell v. Sharp*, 15 Ohio 447; *Paine v. Mooreland*, 15 Ohio 435 [45 Am. Dec. 585]; *Douglass v. Massie*, 16 Ohio 271 [47 Am. Dec. 375]; *Cochran v. Loring*, 17 Ohio 409; *Newman v. Cincinnati*, 18 Ohio 323; *Reynolds v. Stansbury*, 20 Ohio 344; *Fowler v. Whitemen*, 2 Ohio St. 270; *Moore v. Robinson*, 6 Ohio St. 302; *Trimble v. Longworth*, 13 Ohio St. 431; *Cal-len v. Ellison*, 13 Ohio St. 446; *Hammond v. Davenport*, 16 Ohio St. 177; *Calkins v. Johnson*, 20 Ohio St. 539; *Cincinnati, S. & C. Ry. v. Belle Center (Vil.)*, 48 Ohio St. 273 [27 N. E. Rep. 464]; *Winemiller v. Laughlin*, 51 Ohio St. 421 [38 N. E. Rep. 111]; *Bank of Wooster v. Stevens*, 1 Ohio St. 233 [59 Am. Dec. 619]; *Swasey v. Blackman*, 8 Ohio 5; *Shroyer v. Richmond*, 16 Ohio St. 455; *Woodward v. Curtis*, 10 Circ. Dec. 400 (19 R. 15); *Woodward v. Curtis*, 63 Ohio St. 575 [60 N. E. Rep. 1135]; *Clark v. Clark*, 8 Circ. Dec. 752 (16 R. 103).

Tender. Swan's Treatise (13 ed.) 806; Rev. Stat. 6581 (Lan. 10163); *Bahmann v. Stoner*, 59 Ohio St. 497 [52 N. E. Rep. 1022]; *Dumey v. Donovan*, 8 Dec. 118 (7 N. P. 221).

Money must be brought into court. Swan's Treatise (13 ed.) 812; *Hay v. Ousterout*, 3 Ohio 384; *Bahmann v. Stoner*, 59 Ohio St. 497 [52 N. E. Rep. 1022]; *Foote v. Palmer*, Wri. 336; Rev. Stat. 5137 (Lan.

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8652); *Burt v. Dodge*, 13 Ohio 131; *Cohoon v. Kineon*, 46 Ohio St. 590 [22 N. E. Rep. 722]; *Storer v. Bohmann*, 9 Circ. Dec. 860 (18 R. 884); *Dumey v. Donovan*, 8 Dec. 118 (7 N. P. 221).

Motion to strike out tender. *Fuller v. Pelton*, 16 Ohio 457; *Huntington v. Ziegler*, 2 Ohio St. 10; *Armstrong v. Spears*, 18 Ohio St. 373; *Tipton v. Tipton*, 49 Ohio St. 364 [30 N. E. Rep. 826]; *Cincinnati Gas Light & C. Co. v. Avondale*, 43 Ohio St. 257 [1 N. E. Rep. 527].

Costs as part of the judgment. *State v. Meigs Co. (Comrs.)* 7 Circ. Dec. 351 (14 R. 26); *Bell v. Bates*, 3 Ohio 380; *McDonald v. Page*, Wri. 121; *Russell v. Giles*, 31 Ohio St. 293; *Bliss v. Long*, 5 Ohio 276; *Naper v. Bowers*, Wri. 692; *Faucett v. Meeker*, 31 Ohio St. 634; *Bradley v. Wachter*, 7 Circ. Dec. 565 (13 R. 530).

J. W. Slough, for defendant.

KILLITS, J.

This case, involving less than \$14, has been fought as if millions were at stake. Gares and Stever were sureties for Partee on a note for \$100 made to one Patten. Partee, who was a thresher, died insolvent, and from his estate proper was paid on the note a dividend of but \$18.54, leaving due thereon with accrued interest, about \$125. Gares was also a debtor to Partee's estate for a threshing bill, and at the time the final dividend was paid by the administrator on the note, Gares paid his threshing bill, also to be applied on the note. The indorsements on the note setting these payments up are as follows: "January 5, 1903, received from W. H. McCauley, administrator of O. B. Partee, \$18.54, the amount that said estate paid on note. January 5, 1903, received from W. H. McCauley, administrator, \$26.81, said amount paid to administrator by J. H. Gares." The plaintiff's threshing debt to Partee's estate was \$26.81. The testimony of McCauley, the administrator, made it plain that the entire amount of Gare's debt to the estate, instead of swelling the fund available for the payment of dividends, was applied on this note to the relief of the sureties, to that extent, and that no attempt has been made otherwise to collect Gares' debt to the estate, the administration of which has been fully settled. Subsequently, Gares was compelled to pay the balance due on the note, \$114.20, this being only the amount and interest due after the application of his said debt in full. He now sues Stever, not only for one-half of the \$114.20, but also for one half of the \$26.81, the amount of the threshing bill.

It is the view of the court, that the contention, that Gares may get back from his cosurety one-half of his threshing bill credit, arises from confusion as to the exact nature of the right of contribution, which rested originally upon equitable principles, (*Hartwell v. Smith*, 15 Ohio St. 200), and so generally acknowledged that courts of law assume to imply a contract status to sureties upon the theory that they take upon themselves that position because of the universality of the equitable principle. Brandt, Suretyship Sec. 254.

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From this it follows, that the right of contribution arises, in law at least, only after payment has been made by one surety in excess of his share, and to the extent, only, that he has paid. Stearns, Suretyship Sec. 286, 288; 9 Cyc. 798, 800; 7 Am. & Eng. Enc. Law (2 ed.) 332, 342; *Camp v. Bostwick*, 20 Ohio St. 337, 348 [5 Am. Rep. 669].

The cases cited in the notes to the texts referred to above amply support the proposition that in no manner can one surety speculate off of the other. Any indemnity which one surety may get from the principal is for the joint benefit of his cosurety, even if the latter is unaware of the fact; if one discounts the debt in paying, he must share the results of his business acumen with his cosurety; in short, every surety must account to his fellow for every advantage he gets in settling with the creditor.

The authorities upon which these propositions are based, and which are referred to in the notes to the text-books and encyclopedias, present such a variety of facts to which the principle was applied that to hold differently in this case would be both an innovation and a presumption. So far, at least, Gares has actually paid but \$114.20. That amount measures his entire loss by reason of his suretyship. In no sense can it be said that the credit of the threshing bill on the note was a payment by him as surety. He is not out of pocket to any extent because of that payment. He but met an obligation that was his alone. It is made plain from the administrator's testimony that Gares got thereby credit on his debt to the estate. The administrator says that he gave a receipt in full for it. While it may have been irregular for the administrator to apply this threshing bill on the Patten note and not add it to the fund for distribution in dividends, we fail to see how, equitably, Gares can claim advantage from such irregular action and ask his cosurety to pay him back half of it. Should it happen that the creditors of Partee's estate ever compel Gares to correct the irregular application of his debt, and he be required to pay an additional sum, it will then be time for him to ask more assistance from Stever. We hold, therefore, that Stever may be required to pay but one half of the \$114.20.

Just prior to the commencement of this case before the justice, in which Gares sued Stever for \$70.50, the latter tendered to the justice \$60, to be used by him, as collector for Gares having the claim, in paying Gares the half of \$114.20, with the accrued interest. The tender was more than ample to meet Gare's claim, on this basis, with interest and costs. The money being refused by Gares, because half of the threshing amount was not included, it was received back by Stever, and the case was begun and tried out below, without anything further being done respecting the tender, and a verdict was returned, upon which judgment was entered, in behalf of Gares for \$57.10. Gares appealed and after the filing of the petition in appeal in this court, Stever attempted to

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make his tender good by depositing the amount, \$57.10, with costs, with the clerk of this court.

Upon this situation arises a contention over costs. It is the court's opinion that the tender before the justice was ineffective to save Stever the costs there because the money was not allowed to remain with the court (*Bahmann v. Stoner*, 59 Ohio St. 497 [52 N. E. Rep. 1022]); and that all the costs made herein since the appeal, including the costs on appeal, are to be adjudged to Gares because he recovered no more by his appeal than was awarded him below. Revised Statute 6591 (Lan. 10173). The judgment is, then, that Gares recover of Stever the sum of \$57.10 and the costs made in justice's court, and that the plaintiff pay all other costs.

APPEAL—COSTS—ERROR—TENDER.

[Defiance Common Pleas, February 11, 1907.]

J. H. GARES v. E. F. STEVER.

1. TENDER TO SAVE COSTS MUST BE DEPOSITED BEFORE TRIAL.

Section 5137 Rev. Stat. (Lan. 8652), providing for a tender available to save costs in an action for the payment of money, applies to like actions before a justice; and unless the tender is followed by a deposit with the justice before trial the benefit of the statute is not available.

[For other cases in point, see 7 Cyc. Dig., "Tender," §§ 50-59.—Ed.]

2. QUESTIONS OF LAW ARE ONLY INCIDENTALLY REVIEWED ON APPEAL.

A judgment of a justice, based on conceded facts, is reviewable only on error; and judgments that are the result of weighing the evidence, and adjusting disputes of fact are appealable. Therefore, where a justice of the peace wrongfully taxes the costs because of a misapplication of Rev. Stat. 5137 (Lan. 8652), the aggrieved party's remedy is by petition in error, correctible, indirectly, only as an incident of an appeal on the facts.

[For other cases in point, see 1 Cyc. Dig., "Appeals," § 681 *et seq.*; 4 Cyc. Dig., "Error," §§ 128-147.—Ed.]

3. COSTS OF APPEAL TAXED TO APPALLANT ON FAILURE TO INCREASE RECOVERY.

Under Rev. Stat. 6591 (Lan. 10173), the plaintiff on appeal failing to show that he is entitled to a greater recovery than he had below, governed by the defendant's indebtedness to him, should be taxed with the cost of the appeal.

[For other cases in point, see 1 Cyc. Dig., "Appeals," §§ 820-826; §§ 960-963.—Ed.]

[Syllabus approved by the court.]

REHEARING.

J. H. Hockman and Harris & Cameron, for plaintiff.

J. W. Slough, for defendant.

KILLITS, J.

This case was submitted to the court last summer, a jury being waived, and for judgment the court found for the plaintiff in the sum of \$57.10, and divided the costs, directing that all costs before the

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justice should be paid by defendant and all costs made in this court should be paid by plaintiff, because the record showed that plaintiff had recovered the same sum, \$57.10, at the hands of the justice and had appealed himself from that judgment, wherefore, following Rev. Stat. 6591 (Lan. 10173), he should not recover his costs in this court. This judgment of this court, as to costs, was not satisfactory to either party, and each asked and obtained a rehearing on that branch of the case, upon which the court now attempts a decision. The plaintiff insists that he recovered more in the court of common pleas than he did before the justice, wherefore he should be allowed the costs made upon his appeal, and exhibits the record of the court below wherein it appears that, although giving him judgment for the same sum he recovers in this court, \$57.10, the justice assessed against him the costs below, whereas this court found that those costs should be paid by the defendant. The defendant contends that he should pay no costs whatever, in either court, because he offered to pay plaintiff the sum of \$57.10 before suit was brought, under circumstances which he thinks entitles him to the benefit of Rev. Stat. 5139 (Lan. 8654).

The question raised by plaintiff is an interesting one, and depends for its solution upon the scope of the statute providing appeals from a judgment of a justice, and the application of Rev. Stat. 6591 (Lan. 10173) to the state of facts shown on these extracts from the justice's docket. After setting out the verdict of the jury awarding plaintiff the sum of \$57.10, the transcript follows:

"I do find from the evidence adduced that the said E. F. Stever made a tender of \$57.10 in lawful money prior to the commencement of this action. The plaintiff then and there refused to accept the money tendered as not being sufficient in amount, and that the tender was not made in writing and the money was not deposited in court at the time of trial. L. F. Orahod, J. P." "Thereupon on said day it was by me considered that the plaintiff recover of said defendant the sum of \$57.10 debt, and that the plaintiff, J. H. Gares, pay the costs of this action as taxed per margin. L. F. Orahod, J. P."

It further appears from the transcript that the plaintiff, in addition to perfecting an appeal, filed a motion for new trial and also a separate motion to retax costs, both of which motions were overruled and exceptions saved by plaintiff.

It needs no argument to show that the vice of the justice's action in taxing costs to plaintiff was not the result of an error of fact, but an error in the application of law. The Supreme Court, in *Bahmann v. Stoner*, 59 Ohio St. 497 [52 N. E. Rep. 1022], says that Rev. Stat. 5137 (Lan. 8652), providing for tender, applies in justice cases, and that there, as in the higher courts, unless the tender is followed by a deposit before trial, it is not available to save costs. Therefore, the

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justice, upon the recitation of fact made in the transcript, above quoted, should have taxed the costs against defendant Stever, and, erring then, should have allowed the motion made by Gares to retax. To that action of the justice undoubtedly error might have been successfully prosecuted in this court.

This question now presses for answer, and the answer, we think, determines the contention respecting these costs: Suppose plaintiff was content with the recovery of \$57.10 in his favor, and complained only of the erroneous taxing of costs, could he proceed to correct that error by way of appeal? We think not, upon principle. Revised Statute 6583 (Lan. 10165) provides, indeed, for appeal to this court from any judgment of a justice in all cases not otherwise specially provided for by law; likewise Rev. Stat. 6708 (Lan. 10298) provides for a review in error in this court of any judgment of a justice. Do these two statutes travel over the same ground, so that any appealable judgment may be reviewed on error, and *vice versa*? Most certainly not. We are clearly of the opinion that all such judgments of a justice as are based solely upon an application of the law to conceded facts, are reviewable only in error, and such judgments only as are the result, in whole or in part, of weighing evidence, and adjusting disputes of fact—questions which contain mixed law and facts—are appealable. Therefore, we think that the only remedy that Gares had on the costs side of the judgment was by petition in error, correctible but indirectly on appeal, only as an incident of the appeal on the facts. Plaintiff seemed to have an impression that error was his appropriate remedy when he filed a motion to retax the costs, but, unfortunately, he failed to build upon this foundation with a petition in error.

Revised Statute 6591 (Lan. 10173), upon which we taxed costs in this court, to the plaintiff, reads as follows:

“If any person appealing from a judgment rendered in his favor, shall not recover a greater sum than the amount for which judgment was rendered, besides costs and the interest accruing thereon, every such appellant shall pay the costs on such appeal.”

The language of this section would almost, if not quite, exclude the idea that the taxation of costs below had anything to do with determining where the costs should fall on appeal, but whether it does or not, it is the judgment of the court that the only thing appealable from was the decision on the question of fact, How much did the defendant owe plaintiff? and that the taxation of costs followed only as an incident of the judgment, and that when the plaintiff fails to show this court that he is entitled to any greater recovery than he had in the court below, as the extent of defendant's indebtedness to him, he is getting as much as he is entitled to when the court proceeds in his behalf to correct the lower court's error in the taxation of costs.

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We have been cited to *State v. Meigs Co. (Comrs.)* 7 Circ. Dec. 351 (14 R. 26); *Bell v. Bates*, 3 Ohio 380; *Bliss v. Long*, 5 Ohio 276; *Russell v. Giles*, 31 Ohio St. 293; and *McDonald v. Page*, Wri. 121 and *Naper v. Bowers*, Wri. 692, to the point that costs of successful party are to be taxed as part of the judgment. We are unable to read any of those cases as conflicting with the opinion above given.

Defendant contends that the justice was right in taxing costs below to plaintiff, because of the provisions of Rev. Stat. 5139 (Lan. 8654) which provides for an offer to confess judgment before suit, etc. The facts, as shown upon the trial in this court, were, that the parties met with the justice, who had for collection, as collector, not as justice, the claim of plaintiff that defendant owed him \$70.50. Stever contended that his debt was but \$57.10, and offered verbally then and there to pay it, giving the justice collector \$60 in bills for that purpose. Gares refused forthwith to take the money, and the bills were immediately handed back to Stever. No record whatever was made of this action, nor was there anything said that could be construed as an offer to confess judgment for that amount. Stever was, and in fact all parties were, of the impression that a tender was being made. The tender was ineffectual to toll the costs for the reasons already given.

The court is of the opinion that its first judgment was right, and the same may be entered as of this day to preserve the rights of all parties, who may also have exceptions.

SALES—WARRANTIES.

[Cuyahoga Common Pleas, May 7, 1907.]

S. H. CALHOON v. WILLIAM BRINKER.

1. SELLER OF SEED DOES NOT WARRANT SAME.

A dealer in garden seeds, who does not grow his own seed, does not warrant that they will produce a certain variety of vegetable, from the mere fact that they are sold as being such.

[For other cases in point, see 7 Cyc. Dig., "Sales," §§ 295-299.—Ed.]

2. PRINTING OF SEED PACKAGE CONSTITUTES THE CONTRACT OF SALE.

Printed matter contained on a package of seed, setting forth the conditions of the sale, constitutes a written contract between the buyer and seller, and the parties thereto are bound as by any other written contract.

3. CATALOGUE OF GOODS AS CONSTITUTING THE CONTRACT OF SALE.

When one buys seed from a printed catalogue the whole of the printed matter contained therein goes to make up the contract of sale; and where a catalogue expressly states that in case any seed are not as represented the purchase price will be returned, no recovery can be had where nothing has ever been paid on the purchase price.

[For other cases in point, see 7 Cyc. Dig., "Sales," §§ 475-482; §§ 495-900.—Ed.]

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MOTION to direct verdict for defendant.

C. A. Neff, for plaintiff:

Cited and commented upon the following authorities. *Edmands v. Hiltz*, 1 Dec. Re. 81 (2 W. L. J. 45); *Rogers v. Morse*, 2 Dec. Re. 31 (1 W. L. M. 178); *Schutt v. Baker*, 9 Hun (N. Y.) 556; *Passinger v. Thorburn*, 34 N. Y. 634 [90 Am. Dec. 753]; *Wolcott v. Mount*, 38 N. J. L. 496 [20 Am. Rep. 425]; *White v. Miller*, 71 N. Y. 118 [27 Am. Rep. 13]; *Rodgers v. Niles*, 11 Ohio St. 48 [78 Am. Dec. 290].

M. B. Excell, for defendant.

BEACOM, J.

In February, 1903, plaintiff was a gardener in the vicinity of Cleveland and defendant was a seedsman doing business in the city. About that date plaintiff went to store of defendant and asked for four pounds of Mammoth Yellow Golden Bush squash seed, and for two pounds of Long Island Beauty Nutmeg melon seed. Defendant gave plaintiff four one-pound packages of the first named seed with the name asked for printed upon the package and also gave two pounds of the last named seed with the name asked for printed upon the package. For purpose of brevity, I shall deal only with the squash seed, because whatever ruling the court makes as to the one must be made as to the other. When plaintiff asked for squash seed of the named variety, defendant said he had it, that it had been raised for him, that it was what the plaintiff wanted. The seeds were delivered to plaintiff, and the appearance was the same as that of the seeds asked for. The plaintiff, a gardener of forty years' experience, could not perceive that they were not the seeds asked for. The seeds were planted and grew, but produced a different squash from that asked for and from that named upon the boxes in which the seeds were contained. Plaintiff seeks to recover from defendant the loss which he suffered by reason of the fact that the squash that grew was inferior to that of which he thought he was buying the seeds. These are the facts. There are two additional facts which will be stated later when I come to the law questions.

I now shall consider the law applicable to these facts, and shall do so under three heads:

1. First, the general proposition, Does a seedsman who gives a package marked with the name of a variety asked for warrant that from these seeds there will grow, if they grow at all, that variety? It seems to me that the law may be different in the case of a seedsman in a large city selling and delivering seeds from what it is where the seeds are bought from a farmer or a gardener who sells what he has grown. Without evidence on the subject, a court must not be blind to the ordinary facts of life, and the facts about the business of a seedsman in a large city are, that he handles chiefly goods which he gets from others, some of them from foreign countries. The evidence in this case is explicit

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that defendant did not himself produce these seeds. He said to plaintiff, "They were raised for me." In other words, "I did not produce them, I got them from the producer;" and while it is not of much or any importance in this case, it might in some cases be important to determine whether the seeds were sold by a person in commercial business of selling seeds or by a gardener or a farmer selling that which he himself produced. The rule manifestly must be different. If one go to a farmer and ask him for certain seeds, the natural inference, the one which the producer has a right to draw, is, that the seeds furnished are those which the farmer himself has taken from the squash, and the case would be very different from that of a man who gets his material, perhaps in car load lots, from foreign states and foreign countries.

Passing from the character of defendant's business and the manner in which he handles seeds, we come to the subject of the seeds themselves. This is the determining thing in this case. And here we must recognize the facts of vegetable life, even without any evidence. We all know that no human being can take those seeds that were sold and tell what variety of the species they belong to until the fruit is ripened. We know that no one can tell by simple inspection whether the seed is alive or dead, whether or not it will germinate. We know that farmers in the spring time, in order to know whether or not seed will grow, put some of it in water to see whether or not it will germinate or sprout, as they call it. That is the sort of subject-matter that is being dealt with here. It is something of which the life and character is hidden and in mystery. No amount of diligence on the part of any of us would enable us to take these seeds as they were brought into this court room yesterday and tell what they would produce.

In this case a special variety of squash seed was asked for. We all know that varieties are not permanently fixed qualities; that under different conditions of soil and climate they quickly change if not carefully protected against that. We know, for instance, that if a seed be planted in one lot and in a near-by lot there be a different variety of the same species the insects will fly from one to the other and carry the pollen from one to the other; and while one variety is planted, a different variety is produced. Take the ordinary sweet corn that is used for the table and plant it near a field of common yellow corn and the first season the sweet corn will deteriorate by the transmission of the pollen, by insects or by the wind, from the other field. Considering the nature of this man's business, considering the nature of the subject-matter with which he was dealing, it seems clear that if all that had been done were what I have thus far enumerated, this court is of opinion there would be no warranty that the product would be Mammoth Golden Yellow Bush squash.

The court is also of opinion that the conversation related in the store there does not alter the rights of the parties. What is related to

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have been said by the defendant would amount only to the printing the name on the box; a certain variety was asked for, and he said in substance "I have it;" that is substantially all there was of it, and so I think the parties stand in this case in the position of any seedsman, who, when a certain variety of seed is asked for, hands it out with the name printed upon the package, and I am of opinion that a seedsman so doing does not warrant those seeds. To hold that he does would be to make his business a most perilous one. If a seedsman were held under these conditions to warrant that when a person asks him for Mammoth Golden Yellow Bush squash that is what will be produced when the harvest comes, then this business is one of excessive risks. No one would undertake the perils of a business of that kind if that were the rule.

2. I have this far stated this case most favorably to plaintiff. The words, "Mammoth Golden Yellow Bush squash," were not the only words upon the boxes containing these seeds. There was also this printed matter:

"We use all possible care and precaution to have our seed pure and reliable, but we do not in any case warrant or guarantee them. If the purchaser does not accept them on these conditions, they must be returned at once."

I am of opinion that there was a contract in writing between these parties. The whole terms of this transaction were set out there. The dealer did not simply say "Here is Mammoth Yellow Golden Bush squash seed." The plaintiff cannot pick out the words of that printed matter that are favorable to himself, but must accept them all. If the evidence sought to be introduced were, that defendant expressly said in words at that time, "I warrant that these seeds are such as they are marked," this ought to be excluded from the evidence. There is a contract in writing between the parties. It cannot be added to, or contradicted by, oral evidence. Therefore in this view of the case, the court would grant the motion to direct a verdict for defendant.

3. In the third place, it appears that plaintiff and his son went to defendant's store with a list of seeds which the son obtained from the defendant's catalogue of seeds. On page 2 of defendant's catalogue, near the top thereof, is some printed matter in large type and in heavy faced letters. The plaintiff says he does not remember whether or not he ever read it; but it is admitted that on the former trial of this case he said he probably had read it. I think the only proper finding from that state of evidence is, that he did read it, and it reads thus:

"Warranty: We warrant that all seeds sold by us shall prove to be as represented to this extent, that should they prove otherwise we will replace them or send other seeds of the same value."

These seeds were bought under a contract of which this is a part; the parties thereby in that contract liquidated their damages. They

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stipulated that if the seeds were not as represented the defendant would return what had been paid for them; that is the substance of it. The undisputed evidence is, that nothing has ever been paid for them and therefore the parties having made a contract liquidating their damages at the price of the seeds and the seeds never having been paid for, the damage in this case is nothing.

To restate in the inverse order: In the first place this contract in the catalogue stipulates what the damage of the plaintiff shall be, and it stipulates the damages to be the value of the seeds, and the seeds not having been paid for, the damage is nothing. In the second place, the entire printed matter on this package constitutes a written contract between the parties and by that contract the plaintiff was expressly, clearly told that there was no warranty of these seeds. In the third place and as a general rule of law, if a person goes into a seed store and asks for a variety of a species of seeds and they are given to him without comment, the name being printed on the package in which they are contained, there is no warranty whatever. I take it the rule is, that this defendant, like every other person who deals with his fellows, must exercise ordinary care to see that that which he ostensibly sells is that thing. There is no evidence in this case that defendant failed to exercise ordinary care. Therefore, gentlemen of the jury, all questions of fact are for you and all questions of law are for the court, and whether or not there is any evidence is a question of law and not a question of fact.

The court directs you to bring in a verdict for defendant.
Plaintiff excepts.

CRIMINAL LAW—JUSTICES OF THE PEACE.

[Hamilton Common Pleas, March 9, 1907.]

STATE OF OHIO V. CHARLES P. MACKELFRESH ET AL.

1. NOT UNLAWFUL FOR JUSTICE TO ENGAGE IN COLLECTION AGENCY.

An indictment charging that the defendant engaged in the business of a collecting agency, which he was prohibited from doing by reason of his office of justice of the peace, does not charge an offense under Rev. Stat. 6909 (Lan. 10544), inasmuch as there are no common law offenses in Ohio, and there is no statute prohibiting a justice of the peace from engaging in said business; nor does his oath of office amount to such a prohibition.

[For other cases in point, see 3 Cyc. Dig., "Criminal Law," §§ 9-13.—Ed.]

2. REVISED STATUTE 621E (LAN. 991) SPECIAL STATUTE.

Revised Statute 621e (Lan. 991) is a special statute, and does not apply to justices of the peace in Cincinnati township.

[Syllabus approved by the court.]

DEMURRER to indictment.

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H. M. Rulison, prosecuting attorney, F. Morris, assistant prosecuting attorney, L. B. Sawyer and C. O. Rose, for plaintiff.

T. H. Darby, for defendants.

BROMWELL, J.

At the October term, 1906, the grand jury of Hamilton county duly indicted the defendant, Mackelfresh, as principal, and the other defendants as aiders and abettors, for the violation of law in that —

“From the fifteenth day of April, 1905, up to and including the fifteenth day of April, 1906, the said Mackelfresh, at the township of Millcreek in said county of Hamilton, being then and there one of the duly elected, qualified and acting justices of the peace in and for said township in the county aforesaid, with force and arms, at the county of Hamilton aforesaid did knowingly and corruptly engage in a certain business which by reason of said Mackelfresh’s said office of justice of the peace as aforesaid, he was prohibited from doing, to wit: a collection agency, then and there conducted by him, the said Mackelfresh, justice of the peace as aforesaid, in connection with his, Mackelfresh’s, said office of justice of the peace as aforesaid, in the form and manner following:” (Here follows a detailed statement of the method in which the said collection agency was carried on.)

A motion to quash said indictment having been overruled, a demurrer was filed by the defendants on the ground that said indictment did not sufficiently charge any offense against the law of Ohio.

The indictment is drawn under Rev. Stat. 6909 (Lan. 10544), the provisions of which, so far as they apply to the present case, are as follows:

“6909 [Lan. 10544]. An officer under the constitution or laws of this state who knowingly * * * engages in, or suffers others in his employ to engage in, any business which by reason of his office he is prohibited from doing, shall be fined,” etc.

The question then resolves itself to this: Admitting that defendant, Mackelfresh, while serving as justice of the peace, engaged in the business of a collection agency, as set forth in the indictment, was such business one that by reason of his office of justice of peace, he was “prohibited from doing?”

The state claims that such business is prohibited by Rev. Stat. 3 and 621e (Lan. 4, 991). The defendant denies that there is any such prohibition in any statute of the state.

It is conceded by both the prosecutor and the attorney for defendant that we have no common-law offenses in this state, but that every punishable offense must grow out of positive statutory enactment. See *Mitchell v. State*, 42 Ohio St. 383-385; *Smith v. State*, 12 Ohio St. 466-469 [80 Am. Dec. 355]; *Johnson v. State*, 66 Ohio St. 59-65 [63 N. E. Rep. 607; 61 L. R. A. 277; 90 Am. St. Rep. 564]; *Sutcliffe v. State*, 18

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Ohio 469-477 [51 Am. Dec. 459]; *VanValkenburg v. State*, 11 Ohio 404, 405.

It is also a well-established principle of criminal law that any criminal statute must be construed strictly and that the indictment must clearly conform to the meaning and intent of the statute and in some cases to its exact language. *VanValkenburg v. State*, *supra*; *Shultz v. Cambridge*, 38 Ohio St. 659.

In the first of the above last cited cases the court says, page 406:

"The rules of criminal pleading require the offense to be set out, substantially, in the words of the statute. The statute contains a definition of the offense."

In the case of *Shultz v. Cambridge*, *supra*, the court uses this language:

"Where an act is made punishable by fine and imprisonment, the words in which the offense is defined and the punishment prescribed must be strictly construed," etc.

Still stronger is the language of the court in the case of *Johnson v. State*, *supra*. This was a case where a bicycle rider, while riding recklessly in the street, had run down and killed a person, there being no statute of the state nor ordinance or other regulation of the town in which the accident occurred, making careless or rapid riding on the street an offense. The rider was indicted for manslaughter; but the court said:

"In a prosecution for manslaughter, wherein the state relies for conviction on the ground that the deceased was killed unintentionally while the slayer was in the commission of an unlawful act, it must be shown that the alleged unlawful act is prohibited by law; and it is not sufficient to establish that such act so engaged in, was a crime at common law, or one of gross and culpable negligence."

So also in the case of *Smith v. State*, *supra*, page 469, the language of the court was:

"It must be borne in mind that we have no common-law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio, unless such act or omission is specially enjoined or prohibited by the statute laws of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code had not the expansiveness of the common law."

The argument of the prosecutor is briefly as follows:

1. Article 15, Sec. 7 of the constitution of Ohio, provides that—

"Every person, chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the constitution of the United States, and of this state, and also an oath of office."

A similar provision is contained in Rev. Stat. 2 (Lan. 3).

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2. Revised Statute 3 (Lan. 4) of the statutes sets forth the form of the oath to be taken by a judge of a court of record in the following language:

"The oath of office of each judge of a court of record shall be, to support the constitution of the United States and the constitution of this state, and to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding," etc.

3. That a justice of the peace is a court of record and is required to take the oath prescribed in said Rev. Stat. 3 (Lan. 4).

4. That it is a legal and moral impossibility for a justice of the peace, consistently with said oath, to engage in such a collection business as is averred in the indictment and that his engaging in such business is a violation of his oath, which brings it within the prohibition of Rev. Stat. 6909 (Lan. 10544) under which the indictment is drawn.

5. That even if the terms of his oath of office do not prohibit a justice of the peace from engaging in a collection business, nevertheless he is amenable to the provisions of Rev. Stat. 621e (Lan. 991) which reads as follows:

"It shall be unlawful for said justices of the peace or said clerk or his deputy or deputies to act as counsel, agent or attorney for any party in any matter, suit or proceeding in said courts."

Considering these propositions in their order, there is no question as to the requirement that a justice of the peace must take an oath of office, in accordance with the constitutional provision and the statute cited above. It may also be admitted that the justice's court is a court of record, and that the form of oath prescribed by Sec. 3 is the one he is required to take before entering upon his office and that defendant, Mackelfresh, had duly taken such oath. The court is unable to find any language in said oath that so clearly and directly prohibits the defendant from engaging in the collection business as would make his doing so a crime.

The other section relied upon by the prosecutor, *i. e.*, Rev. Stat. 621e (Lan. 991), we have examined carefully and are satisfied it has no bearing upon the question before us.

Revised Statute 621 (Lan. 955) is a general section devoted to prescribing the fees of justices for the various services they are required to perform. It is not limited to any county, but is general throughout the state. It, with the exception of its supplementary and amendatory sections, is the last section of the general chapter 9 under title 4 devoted to the laws applicable to justices of the peace.

Revised Statutes 621-1 to 621-31 (Lan. 956 to 986) form a special act applicable to Toledo only.

Revised Statutes 621a and 621b (Lan. 987, 988) are special laws

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relating to Cleveland and Cincinnati. Revised Statutes 621c and 621d (Lan. 989, 990) are special laws relating to Columbus.

The first time Rev. Stat. 621e (Lan. 991) appears is in 93 O. L. 417, where the language was:

Revised Statute 621e (see Lan. 991). "It shall be unlawful for said justices of the peace or said clerk or his deputy or deputies to act as counsel, agent or attorney for any party in any matter, suit or proceeding within the jurisdiction of said courts. A violation of this provision shall be deemed misconduct and shall be sufficient cause for removal from office of the party so violating."

The section just quoted was contained in an act "to amend Rev. Stat. 621c and 621d (Lan. 989, 990) and to supplement Rev. Stat. 621 (Lan. 955). Revised Statutes 621c and 621d (Lan. 989, 990) apply only to Columbus, and as Rev. Stat. 621e (Lan. 991) is amendatory to these sections it also would be construed as applying only to that city. This presumption is sustained in the language of Rev. Stat. 621e (Lan. 991) itself. It refers to *said* clerk or his deputy or deputies and to suits or proceedings within the jurisdiction of *said* courts. The clerk, deputies and courts so referred to are provided for by Rev. Stat. 621c and 621d (Lan. 989, 990) and are not mentioned in Rev. Stat. 621 (Lan. 955) itself. The contention of the prosecutor that Rev. Stat. 621e (Lan. 991) is of a general nature cannot be sustained and in the opinion of the court its provisions are limited to Columbus alone, and have no authority in this county.

We may say, in passing, that the very fact that it was thought necessary in drafting this legislation for Columbus, to insert a separate section, Rev. Stat. 621e (Lan. 991), to specifically prohibit a justice of the peace from acting as an agent for any party in his court, would raise a strong presumption that the legislature recognized the fact that engaging in a business which was prohibited by the office of justice of the peace could only be prevented and punished by plainly enacting that such business should be a violation of law, as was done in Rev. Stat. 621e (Lan. 991).

The court has endeavored diligently, but in vain, to find in the statutes any prohibition of the business of a collection agency carried on by a justice of the peace. The carrying on of such a business and with the details set forth in the indictment may result in great abuse and tend to partiality, unfairness and oppression. It may lower the dignity of the justice's court by such methods as it is alleged were pursued by the defendant and his subordinates. It may be contrary to ethics and decency, but so long as the legislature has not prohibited such action by a positive enactment of law, it is not in the power of the prosecutor to reach such cases by indictment and it is not within the province of the court to say that such acts are in violation of law.

The demurrer will, therefore, be sustained.

Superior Court of Cincinnati.

ASSESSMENTS—MUNICIPAL CORPORATIONS—SEWERS.

[Superior Court of Cincinnati, Special Term, February 14, 1907.]

EDMUND K. STALLO ET AL. V. CINCINNATI (CITY) ET AL.

1. NECESSITY OF NOTICE OF SEWER IMPROVEMENT.

Failure to serve notice on an abutting property owner of a resolution declaring the necessity of a sewer improvement does not render the assessment void as to such owner, where it appears that notice was given by publication as required by Rev. Stat. 2304 (see Lan. 3602; B. 1536-211).

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 1237-1268.—Ed.]

2. LIABILITY OF ABUTTING OWNER FOR ASSESSMENTS FOR IMPROVEMENTS.

Where the owner of a platted lot purchases a narrow strip of land lying between his lot and a street in which a sewer is afterward constructed, his lot will be regarded for purposes of assessment as abutting on the street.

[For other cases in point, see 1 Cyc. Dig., "Assessments," §§ 223-447.—Ed.]
[Syllabus approved by the court.]

E. W. Kittredge and G. P. Stimson, for plaintiffs:

Cited and commented upon the following authorities: *Cincinnati v. Seasongood*, 46 Ohio St. 296 [21 N. E. Rep. 630]; *Raymond v. Cleveland*, 42 Ohio St. 522; *Cincinnati v. Connor*, 55 Ohio St. 82 [44 N. E. Rep. 582]; *Crossley v. Findlay*, 6 Circ. Dec. 553 (10 R. 286); *Younglove v. Hackman*, 43 Ohio St. 69 [1 N. E. Rep. 230]; *Spangler v. Cleveland*, 35 Ohio St. 469; *Douglass v. Cincinnati*, 29 Ohio St. 165; *Wolfe v. Avondale*, 8 Circ. Dec. 1 (14 R. 375); *Buse v. Cincinnati*, 11 Dec. Re. 613 (28 Bull. 111); *Griswold v. Pelton*, 34 Ohio St. 482.

J. R. Schindel, for defendants:

Cited and commented upon the following authorities: *Younglove v. Hackman*, 43 Ohio St. 659 [1 N. E. Rep. 230]; *Buse v. Cincinnati*, 11 Dec. Re. 613 (28 Bull. 111); *Price v. Toledo*, 2 Circ. Dec. 417 (4 R. 57); *Bolton v. Cleveland*, 35 Ohio St. 319; *Spangler v. Cleveland*, 43 Ohio St. 526 [3 N. E. Rep. 365]; *Lewis v. Laylin*, 46 Ohio St. 663 [23 N. E. Rep. 288]; *Norwood v. Baker*, 12 O. F. D. 228 [172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. Ed. 443]; *French v. Paving Co.* 181 U. S. 324 [21 Sup. Ct. Rep. 625; 45 L. Ed. 879]; *Caldwell v. Carthage*, 49 Ohio St. 334 [31 N. E. Rep. 602]; *Cupp v. Seneca Co. (Comrs.)* 19 Ohio St. 173; *Emery v. Cincinnati*, 6 Dec. 411 (4 N. P. 220); *Nitzel v. St. Bernard*, 3 Dec. 703 (3 N. P. 317).

HOFFHEIMER, J.

This is an action to enjoin the collection of certain sewer assessments, that were levied upon two certain parcels or strips of land, the property of plaintiffs herein. These strips of land are but nine feet in depth; and the contention of the plaintiffs is, that the sewer improvement is of no benefit to said land, and that in any event the assessment

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should be limited to 25 per cent of said strips. Secondly, it is claimed that the assessment is void because no notice of the resolution declaring the necessity for the improvement had been served upon plaintiffs.

The city not only claims that service of notice was unnecessary, but also, that the two narrow strips of land in question adjoined and were contiguous to lots 12 and 14 of the subdivision in which they were situated, and that after being acquired by plaintiffs, their respective depths are to be considered as being added to, or merged with, said lots 12 and 14, and that as said lots are therefore brought up to the Belvidere street—or as it is otherwise referred to Beldare street—they are assessable.

From the agreed statement of facts it is evident plaintiffs acquired title to lots 12 and 14 on or about May 23, 1874. Said lots appear in Archibald Irwin's subdivision, as do also lots 11 and 13, and it is out of these last-named lots that the narrow strips here involved are carved. Lots 12 and 14 are 239 feet in depth, and front according to Archibald Irwin's plat on North street. In May, 1886, a fifty-foot strip was dedicated as a public street—Belvidere or Beldare street. This strip lies nine feet west of the east line of lots 11 and 13, and extends from the south line of West street 239 feet, more or less, to the north line of Moesinger & Hoffman's subdivision (exhibit "D").

The above sketch shows the lines of the street in question, and the narrow strips which by this dedication are severed from lots 11 and 13. Some time after the dedication of Beldare street—I think in November, 1886—plaintiffs acquired title to the two narrow strips thus cut from lots 11 and 13. Lots 12 and 14 are and have always been unimproved property; likewise the nine-foot strip in question.

Such being the facts, the question is, Did these nine-foot strips by virtue of their purchase by plaintiffs, become a part and parcel of lots 12 and 14, so that said lots 12 and 14 in fact bound and abut on Beldare street? Or when Beldare street was dedicated did it sever lots 11 and 13 into two parcels for the purposes of assessment?

To sustain the latter contention, plaintiffs cite *Younglove v. Hackman*, 43 Ohio St. 69 [1 N. E. Rep. 230]. That case, however, simply indicates that the land west of Beldare street cannot be assessed as one tract with the land east of said street. *Buse v. Cincinnati*, 11 Dec. Re. 613 (28 Bull. 111), also relied on by plaintiffs, was a case where the occupant was not the owner of the Buse strip, but was a mere licensee of the strip which adjoined property owned by him. By reason of the intervention of this one and a half-foot strip between him and the street the court held that Buse was not an abutting owner, and that his adjoining property was not subject to the assessment for the establishment or construction of the street. In the latter part of the decision the court said:

"In this case plaintiff (Lewis Buse) is not the owner of the one and one-half-foot strip. He is merely a licensee without consideration

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* * *, and no acts have been performed on his part of such a character as would prevent a revocation of the license and create an estoppel against Herman Buse (the owner of the strip)."

From these facts it requires no further argument to show that this case is no authority for plaintiff's view. If Lewis Buse had become the owner at the time he acquired the license, or if facts creating an estoppel against Herman Buse had arisen, inferentially at least it seems that there might have been a different ruling.

The city, however, to sustain its claim that lots 12 and 14 are assessable as abutting (including the nine-foot strip) cites us to *Price v. Toledo*, 25 O. C. C. 617. In that case it appeared that in order to straighten the lines of a street, the city vacated a certain wedge-shaped strip. It was held that while the title thereupon reverted to the owners of the lots that did abut or abound upon the street before the vacation, the intervention of this strip between the street and the lots was not permitted to defeat the assessment. The court said, page 620:

"There is no question but that the title to this property is in these lot owners, and the effect of it is, that this adds to their lots—they have that much more property—and it brings them to the street; it is immaterial that this strip still goes under the numbers of the lots that it formerly belonged to." It belonged at the time it was taken by the city to lots other than those in question in the case, and lying in front of them. "The truth and the fact is, that it has become a part of the lots of these owners adjoining it, and in the improvement of the street these lots are to be regarded as bounding and abutting upon the street. They do in fact abut upon the street and have all the advantages and benefits of it and there would be neither justice nor equity in holding that they cannot be assessed for the improvement of the street, and we hold that they may be."

It seems to me the equity and justice of the case at bar lie within similar considerations. By voluntarily acquiring this nine foot strip after dedication, these plaintiffs brought their property—lots 12 and 14—up to Beldare street. Whether that was their object in purchasing said strips or not would be immaterial; such was the effect. In fact, it is difficult to conceive of any practical use to which said strip could be put independent of said lots 12 and 14.

If, however, as is pointed out by counsel for the defendant, the lots involved in *Price v. Toledo*, *supra*, could be made abutting by operation of law by casting title of the vacated strip upon the owners, it would seem the same result would follow where the owners themselves bring their lots up to the street by voluntarily acquiring the title to the strips in question.

In addition to this the statute, it will be observed, contemplates assessment not according to the lines of the platted lots as assumed by the plaintiffs, but it seeks to assess "property bounding and abutting on the

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improvement." When the narrow strips were acquired a merger was effected with lots 12 and 14, and therefore said lots 12 and 14, including the additional nine feet, must be held to be the property of plaintiffs, bounding and abutting on Beldare street, and therefore assessable.

As to the contention of plaintiffs, that the assessment is void for failure of the city to give or serve notice of the resolution declaring the necessity for the improvement or of any purpose to assess its cost upon the abutting property, I do not think that such notice as to this sewer improvement was required by *Norwood v. Baker*, 12 O. F. D. 228 [172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. Ed. 443], as claimed by plaintiff. See *French v. Paving Co.* 181 U. S. 324, 344 [21 Sup. Ct. Rep. 625; 45 L. Ed. 879]. Since Mr. Kittredge, one of the owners, was a resident at the time of the passage of the resolution declaring the necessity for the improvement, and since the publication necessary by original Rev. Stat. 2304 (see Lan. 3602; B. 1536-211), was duly made, I am of opinion that the city did all that it was required to do under the law.

Having concluded that lots 12 and 14 are to be treated as though originally fronting on Beldare street, I think it but just to reopen the case and afford plaintiffs an opportunity to offer evidence as to the value of these lots if they so desire. Otherwise, the petition will be dismissed.

AGENCY—ELECTION OF DIRECTORS BY PROXIES—INSURANCE.

[Superior Court of Cincinnati, Special Term, March, 1907.]

WALLACE B. BURCH ET AL. V. BENNETT F. COAN ET AL.

1. DISCRETIONARY POWER OF HOLDER OF PROXIES AS TO VOTING SAME.

The secretary of a mutual insurance company, to whom the policy holders have given their proxies to vote and cast their ballots at the election of officers for the company, is vested with discretionary power, and the manner in which he exercised such power is not ground for complaint, unless it has been clearly abused.

2. INCIDENTAL BENEFITS TO AN AGENT NOT NECESSARY EVIDENCE OF FRAUD.

Where the secretary of an insurance company, by voting proxies given him by the policy holders, elects a new board of directors, who, in turn, enter into a contract of employment with him for a term of ten years, it cannot be said, because of the incidental benefits to the secretary, that the election of the new directors was a fraudulent collusion of which the re-employment of the secretary was a part, where it appears from the circumstances of the case that he was acting in good faith and for the best interests of the company.

[Syllabus approved by the court.]

J. C. Healy, W. F. Boyd and M. C. Slutes, for plaintiffs.

W. N. Tuller and H. D. Peck, for defendants.

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HOFFHEIMER, J.

Plaintiffs sue on behalf of themselves and all other policy holders in the Ohio Mutual Life Insurance Company, a corporation under the laws of Ohio. The defendants are Bennett F. Coan and seven others, who were recently elected directors in said company. Plaintiffs ask that a certain contract entered into by and between said Coan and the new board be set aside and held for naught and that the court inquire into the validity of the election of said new board and upon a final hearing direct a new election. A temporary injunction was issued restraining Coan from taking any steps under said new contract and the new board from acting.

In the opinion heretofore rendered herein on demurrer to the petition, *Burch v. Coan*, 17 Dec. 563, it was stated that a court of equity could not try title to corporate office when that question was raised solely, but that if that question was incidental or collateral, it would be considered along with all the others if necessary, if the equitable jurisdiction of the court was otherwise properly invoked on matters specially cognizable in equity.

The election involved in the case at bar is claimed to have been part of a plan, whereby a contract was secured by defendant, Bennett F. Coan, from his codefendants, the new board, in the Ohio Mutual Life Insurance Company, a board alleged to have been fraudulently elected by said Coan on proxies held by him and for the purpose of securing said contract. It is therefore necessary to consider the manner in which the election was brought about in connection with the question of the contract. The gravamen of the action is fraud and breach of trust. As I understand plaintiff's claim it resolves itself to this: (a) That Coan owed a duty to the board and to the company to vote the proxies in his hands for the old board. (b) That as general manager he occupied a confidential relation and that he owed all the policy holders the duty of giving them an independent board, one that would stand between him and the company; that the burden of proof is on Coan to prove that he did so and that the contract is a fair one for the company.

What special duty, if any, did Coan owe the old board or the company in voting the proxies in his hands?

The petition with reference to these proxies alleges that it was the custom from and since the organization of the company that a committee of three of the policy holders should select candidates from among said policy holders to serve as directors throughout the ensuing year and such committee always named the old board for the previous year; that the candidates so selected were always recommended for election by the then existing board of directors and officers of the company; that it was the custom of the board of directors to cause written or printed proxies to be sent to each policy holder authorizing the com-

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pany's secretary to vote and cast the ballot of such policy holder at such election; that at such election it was the universal custom that practically all of the ballots cast were voted by such secretary upon the proxies so received and that such had been the common understanding of the policy holders in regard to said elections; that it was always understood and agreed by said secretary when he received said proxies that he would vote same for the directors so selected by the policy holders' committee and that the board of directors instructed him to do so; that he always obeyed said instructions until the election of February, 1907; that in compliance with the orders of the board Bennett F. Coan sent out the proxies; that Coan was instructed by said board and the policy holders to vote the proxies for the old board; that Coan agreed to do so; that instead of so doing on February 9, he, Coan, for the purpose of obtaining, without the knowledge of said board of directors or the policy holders, an extension of the existing contract between him and said company for ten additional years, obtained the consent of certain persons to co-operate with him in carrying out said plan, said persons being John H. Frey, Willis N. Tuller, George M. Daum, Albert P. Gahr, Chas. C. Rothier, Robt. W. Richey and George I. King; that thereupon it was agreed between him and said persons last named on or about February 9, 1907, that said Coan should have a ticket printed with the names of said seven persons thereon as directors and that he should vote said proxies for said seven persons as such directors instead of the twelve persons nominated by said policy holders' committee; * * * that as soon as he should so vote and elect said seven directors they would immediately organize and enter into such new contract with him; * * * that in violation of his instructions from the old board and of his duty to the said company and the policy holders he fraudulently cast 283 votes for the seven gentlemen named and six votes for the old board * * *.

Now whatever may have been done in the past with reference to facilitating elections I am of opinion that the evidence wholly fails to establish any particular custom that could be said to be binding either upon the givers of or upon the holder of the proxies involved. If it was "always understood and agreed by said secretary (Coan) when he received said proxies that he would vote same for the directors so selected by the committee of policy holders" and if it was "the custom of the board to cause written or printed proxies to be sent to the policy holders authorizing the company's secretary to vote and cast the ballot of the policy holder at the election" then what becomes of the testimony of Mr. Van Fleet, principal witness for the plaintiffs when he says, "By accident I saw proof of the proxies. I told Coan it was understood at the time I came that proxies were to run in my name?" According to the testimony for the plaintiffs the board itself without notice to the policy holders had endeavored to or had authorized a

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change in the "custom" of having the "secretary" cast the ballots. Moreover it is claimed the method of election as set out in the petition was always the common understanding of the policy holders in such regard. But the evidence wholly fails to prove this allegation or that the board of directors always or at any time ordered Coan to vote for any particular persons.

The evidence shows that the proxies were not made out to Coan as secretary but to Coan individually and that there was further a blank in the proxy itself indicating that the giver of the proxy might strike out the name of Coan and insert the name of any person he desired to represent him. The evidence also shows that Coan voted these proxies at all times without any orders from the board. It must also be noted that no misrepresentations were made by Coan to the policy holders in procuring the proxies. The policy holders were not deceived nor misled in any way as was the fact in *Townsley v. Insurance Co.* 56 App. Div. 232 [67 N. Y. Supp. 664], relied on by plaintiffs.

When the policy holders constituted Coan their proxy the power was without limitation; it was a power involving the exercise of judgment or discretion. It created an agency and this agency was obviously created because the principal placed confidence in the particular agent selected and there is abundant reason why the trust could not be transferred to another of whose fitness or capacity the principal may have no knowledge without the latter's consent. Mechem, Agency Sec. 185. *Delegatus non potest delegare* applies. The absolute proxies, therefore, could not be made to yield to orders from the board for that would be delegating the power, nor could they be restricted by some alleged usage not shown to have been known to the givers of the proxies nor assented to by them. To hold that Mr. Coan was compelled to act in accordance with such alleged custom or usage or that in voting the proxies he was subject to the desires or instructions of the board whose secretary he was would be tantamount to declaring that the proxies which purported to confer absolute power on Coan to vote as he saw fit as a matter of fact authorized him to vote only as the board of directors saw fit.

It thus appearing that Coan was vested with that discretion, who can complain as to the manner in which he exercised it? Or who can be heard to complain if he abused that discretion? It is probable that the givers of the proxies would have such right if there had been a clear abuse of this power. But they are not here complaining. Instead, certain policy holders acting on their own behalf and claiming to act on behalf of all the other policy holders (the latter allegation is not proven) seek to impugn the acts of the proxy. Assuming for argument that they have some such power to inquire into the manner in which that discretion was exercised, have they shown a clear abuse of discretion on the part of the proxy? Manifestly a mere mistake in judgment

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would not be an abuse. In any event the plaintiffs would have to show, if they had any right to pursue the inquiry at all, that the judgment of the proxy was exercised for selfish purposes and to the detriment of the company. In order to have light on this question it becomes necessary to examine the facts that led up to the election.

It is true Coan's contract was about to expire and that he was interested in securing a new one. His office was subject to the wishes of the board and it is only fair to presume that the givers of the proxies knew this fact. But the mere fact that he had a personal interest in the matter could not be sufficient in itself to render his act in voting for the new board void. For if the mere casting of the vote by him were to have such effect would he not have voted for the old board also at his peril? For he knew the old board had the matter of his contract under consideration and he knew that some new arrangement was to be entered into. If he voted for what he believed best subserved the interests of the company shall a court pronounce the act fraudulent because incidentally he may be benefited? Coan claims to have exercised his best judgment for the company. Could it be said that he believed or had reasonable grounds for believing that in voting as he did he discharged that duty?

Coan claims that his purpose was to get rid of the Van Fleet methods; that he believed that it was the purpose of Mr. Van Fleet to effect a reorganization at the expense of the old policy holders; he claims to have believed Mr. Van Fleet was doing many things detrimental to the policy holders and the company. True, he did not protest to the old board, because he claims to have believed the old board was divided and that formal complaint would have been useless; he claims that at the outset he intended to speak to the members of the old board individually but that the interview with Mr. Lemon discouraged further efforts in that direction. That he did complain bitterly to Mr. Hill, however, prior to the Gibson House meeting about the usurpation of the post office box and the issuance by Mr. Van Fleet of policies not in accordance with actuarial forms is evident by the testimony of Mr. Hill; he also complained to other members of the executive committee, apparently without avail.

He thereupon prepared charges in writing and he read these charges to the men who were subsequently elected directors and who are now codefendants, at a meeting called for the purpose at the Gibson House. These codefendants are men more or less prominent in local affairs. Prior to the Gibson House meeting they had been interviewed personally by Mr. Tuller, also a policy holder and codefendant. It was Tuller to whom Coan first complained and it was Tuller who it seems first suggested a new board. See testimony of Tuller. There could be no doubt that these codefendants after hearing these charges concluded

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that the best interests of the company required the elimination of the Van Fleet methods. Right at this point it may be noted that the evidence wholly fails to show that there was any collusion as to the election or that there was any prearranged agreement by which any new contract was to be voted to Mr. Coan. So that as to this allegation in the petition there is a complete failure of proof.

The seven new directors as stated were mostly all business men. They were not under the influence or control of Coan; they were policy holders of long standing and were pecuniarily interested in the success of this company. They had ample time to think and to act independently of Coan. In a sense they owed their election on the board to Coan; so did the members of the old board, but it would be difficult to believe that for the favor of being permitted to sit on this board these men were ready and willing to barter away not only their individual interests but likewise the rights and interests of hundreds of persons mutually interested in this mutual insurance association.

It is impossible to go with any detail into the lengthy charges Coan prepared or to analyze in the limits of this opinion the mass of technical testimony adduced thereon. The charges in the main relate to highly technical matters of life insurance. The charge relating to the post office box might not seem to be of particular consequence although Coan professed to fear contingent liability upon his bond because Mr. Van Fleet had acquired the power to control money transmitted to the company in payment of premiums.

With reference to the agency charge, Mr. Coan urged that the Van Fleet contracts created new and excessive liabilities on the company, principally because of exorbitant commissions. The evidence would seem to indicate the commissions stipulated in the Scott contract notably were high. See testimony of Mr. Hyde, expert. This would certainly appear to be the fact when comparing the 10 per cent commission on total premiums paid to be allowed Scott under this contract as against the 4 per cent allowed Coan under his contract.

He complained of the one year incontestable clause as an innovation and he expressed fears in regard to it. The evidence shows that a great many companies do not employ this clause and that while not new at the end of the third, fourth or fifth year period it is practically new at the end of the one year period as in the Van Fleet policies. (Prior to Mr. Van Fleet's policy this company never issued incontestable policies under three years.) He complained of the "ten thousand dollar policy" as being issued contrary to the by-laws although it seems one-half of the amount was reinsured. See Sec. 15, by-laws and the construction placed thereon by the board limiting policies to \$3,000.

He claimed that the reinsurance of one-half of the face of the policy did not relieve the company of its primary liability on the full amount and that policies for amounts so large were not only contrary to the by-

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laws but contrary to the policy of the company and so detrimental to it. The construction of by-law 15 adverted to would seem to furnish ground for the objection of Mr. Coan. He asserted that the "dated-back policy" was unfair and a deception upon the old policy holders; that it was a "gold brick;" that the unfairness of the policy lay in the representation that the policy was paid up in twenty years when such was not actually the fact; that the policy was so complicated that it was difficult for anyone not an expert to understand it; that it promised more than it actually gave and therefore would work injury to the reputation of the company. The testimony of the expert, Mr. Hyde, in regard to this complicated predated policy would indicate that the objections taken to this form of policy by Mr. Coan were not devoid of reason. He claimed he was seeking to protect the assessment policy holders, most of whom he had procured as against a reorganization or the formation of a new company which he believed Mr. Van Fleet was working to bring about in conjunction with Mr. Scott. On this subject his testimony is as follows:

"By Mr. Peck:

"Q. In one of your answers to Mr. Healy you stated that your object, if I understood your answer, in making the statement at the meeting of the new board of directors, or proposed new board, held at the Gibson House, that they were organizing a new company, that your object in making that statement was to protect your policy holders, your assessment policy holders?

"A. Yes, sir.

"Q. Why did you say that?

"A. Because the attitude of Mr. Van Fleet in regard to the ultimate treatment of those policy holders was such as to reveal to me his real motive in coming to Cincinnati and getting possession of the company which was simply to get hold of the franchise of the company and use it for his own ulterior purpose to build up a stock company, and when I had drawn him out on the subject of what would be the exact status of our old policy holders when his new company became a fact and what he thought would be the method of treating them I found out he had conceived the idea in his own mind and revealed to me in this frank way that if they would not take high priced policies on the stock plan he would see they were assessed on the old plan until they got tired and either dropped or acquiesced in paying a very high premium. I told him when he made this confession that not half of them could afford to do it."

If then, in endeavoring to eliminate Mr. Van Fleet and the methods he inaugurated, it appears that Mr. Coan believed or had reasonable grounds to believe he was acting for the company's benefit, how can the plaintiffs complain? But the Van Fleet policy had been inaugurated under the old board; the election of a new board necessarily meant a

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return to old conditions. Was Coan justified in believing that a return to old conditions was for the good of the company?

Coan had been the general manager of the company for many years. He practically procured the bulk of the business which at this time aggregates about \$2,000,000. Even up to the time of the employment of Mr. Van Fleet Coan had built up a "safe and conservative business." See testimony of Alexander Hill.

The inauguration of the Van Fleet policy was not due to immediate necessity to avoid dissolution or failure. The company was organized in 1891 as an old fashioned assessment company. It has in the neighborhood of twelve hundred policy holders. Of these 894 are still holding assessment policies. In 1901 there was a reorganization under the stipulated-premium plan and since that time no assessment policies have been issued. One-third of the policies now in force are old-line policies or saving-bank policies. Under the reorganization it seems old policies may be exchanged for the new forms and it seems this is being done from time to time. So that there is opportunity present to eliminate the old assessment policies in whole or in part. There has been no decrease in the company's finances so far as I can understand the reports; the annual reports from 1901 down to 1905 show a slight increase and the report of February 11, (as of December, 1906) shows the surplus not weaker but somewhat stronger than before. The uncontradicted testimony shows that the average age of the insured is about forty-six years. Judging by what had been considered safe earlier in the operation of this company it could not be said that the action of the old board in seeking to change the policy of this company from an assessment company was absolutely imperative or that proceeding under the old plan necessarily meant dissolution.

The reasons for the engagement of Mr. Van Fleet are thus commented on by members of the old board. The testimony of Mr. Hill who was the president of the company prior to the accession of Mr. Van Fleet and the testimony of Mr. John Holland, members of the old board, clearly show that no imminent danger existed. Mr. Hill testified, in substance, that there had been no dissatisfaction with Coan when Mr. Van Fleet was taken in; that the company was safe and doing a conservative business and that it was in as good condition then as before. Mr. Hill referred to the general desire to enlarge the business and Mr. Boyd also of the old board testified that it was the desire to increase the business and make the company larger. In view of the testimony of these men a court would scarcely be justified in saying that Coan, in endeavoring to have the new board return to the old conservative plan, was doing that which he knew would destroy the company or result in waste or destruction of corporate assets even if that were claimed.

Such being the facts it would not be unreasonable to suppose that Coan, who, as stated, had practically built up the business, believed he

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was acting for the best interests of the company in voting for the new board and thus bringing about a return to old conservative methods. If he honestly believed the charges he made and nevertheless had voted for the old board then manifestly he would have been derelict in his duty to the givers of the proxies. To hold that he did not believe in the charges he made to those prospective directors would require me to find that all the testimony of Mr. Coan was false and this I am unwilling to do and it would require me to hold that there was no reasonable ground for the numerous objections urged by Coan. In view of the fact that there does seem to exist a radical difference of opinion as to whether the old or the new methods are best for this company I would be unwilling so to hold. Under these circumstances Coan's act in voting for the new board cannot be interfered with and I must declare the election valid.

Now one of the first things the new board did was to enter into a ten years' contract with Coan. But the plaintiffs say *arguendo* that this contract should be set aside because secured by a person who occupied a confidential relation; that the securing of this contract meant the continuance of Coan and the elimination of Mr. Van Fleet; and that Coan knew there was danger of disintegration unless the Van Fleet policy be carried out; that Coan was not a success; that he could not place the company beyond the danger line. The evidence, as already set out, in my judgment does not bear out these claims. See testimony of Mr. Hill, Mr. Holland and Mr. Boyd, *supra*.

The cases to which I am cited by plaintiffs as warranting interference by a court of equity in the matter of this contract have reference to a different state of affairs than are here presented. These cases fall within two classes. The first involves a consideration of what are often spoken of as "promoter's cases" and the second relate to what are known as "directors' cases," where directors of a company seek a contract with the company they represent.

In *Erlanger v. Phosphate Co.* 3 App. Cas. 1218, it was self-evident that Erlanger absolutely controlled the board. Indeed, two out of five directors created for the company by Erlanger (promoter) were given stock by him to qualify. The third director was absolutely uninformed as to the matters relating to the valuable contract involved. The entire scheme was illegal. Manifestly the company ought not to have been held to a contract thus fraudulently obtained. In the case at bar no illegality as to the contract is claimed; Coan was neither a promoter nor a director but merely an employe of the company. As stated before, it is fair to presume the proxy givers knew that he was interested for they must have known that his fifteen year contract was about to expire. The new directors had no interest in the matter save their individual interest and the interests of the company. They were business

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men; they were policy holders of long standing; they were not dominated or controlled by Coan; full explanations had been made them by Tuller and by Coan; and they were left in a position to exercise their independent judgment.

Rice's Appeal, 79 Pa. St. 168, 204, presents a case where the corporation was in the "absolute control" of the parties seeking to profit "at the expense of the few outside stockholders scooped up by Ahl's net." The principle involved is similar to that involved in the *Erlanger* case.

The other cases to which I am cited fall within the second class. In *Goodin v. Evans*, 18 Ohio St. 150, 182, 183, a director of one company sells to another company in which he was interested. The fact that the directors have the absolute control of the corporation led the court to remark that this was in effect a sale by the company to itself. Manifestly Coan had no such control of this company.

In *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598, it was held that directors of a company may not use their positions to advance their individual interests as distinguished from that of the corporation, and the burden is on them to show the fairness of any transactions had between themselves and the company.

From the facts as set out in the case at bar, in my judgment these cases are readily distinguishable. The proposition would scarcely be denied that Coan as stockholder or rather policy holder had every right to contract with the corporation but assuming that Coan, an employe of the company (not a director nor having absolute control of the company), entered into a contract with the board and, assuming that the same rule should be applied as is laid down in the directors cases to which I am referred, can it be said that he has failed to sustain that burden? Is the contract that he secured fair and equitable and intended for the benefit of the company?

The evidence shows the new board discussed the terms of the old Coan contract and that they considered the terms of the proposed new contract recommended by the committee of the old board. That contract involved an increasing salary proposition and likewise future commissions in event of Coan's retirement or death. The term of that contract would probably have been four years.

The report that the committee proposed provided that the contract might be annulled on thirty days' notice but Coan having noted his objections to this feature of the proposed contract two out of three of the committee wrote to him offering to strike out that clause. The new contract fixed the limit of the employment at ten years—the contract about to expire had run for fifteen years—and it is provided that physical incapacity to manage the business was sufficient cause to annul. But the new contract provided for no stated or increasing salary and the

compensation as in the original contract was made entirely dependent on the amount of business secured.

The evidence shows that Coan netted about \$250 per month under the old contract. The proposed contract of the old board provided a graduated salary which in time would be greater than the largest amount netted by Coan at any time under the old contract. This being a mutual company it was probably considered best for the interests of the company that there should be no salary or increasing salary the basis of which was prospective business (always a matter of uncertainty) but that the compensation should be commensurate with the business actually secured, a provision that strikes my mind as fair, especially when it is considered that the provision is precisely similar to the old contract and that the old contract had been time-tried and was in successful operation for a period of fifteen years.

The provision as to future commissions saves the company sixty-seven cents on every one thousand dollars of insurance over the provisions of the old contract, because if Mr. Coan had received no new contract and had retired from the company on the expiration of his old contract he would draw one dollar per thousand on every policy existing under the old assessment plan and one dollar and sixty-seven cents per thousand on every stipulated premium policy or other policy and the same amount would accrue to his heirs after his death. It may be noted that this provision was precisely similar to the one recommended by the committee of the old board.

When it is remembered that the bulk of this business was practically secured by Mr. Coan; that as already indicated the company had been successful and that there was no falling off in the assets but rather a gain; that the employment of Mr. Van Fleet was merely for the purpose of enlarging the company; that in resolving to go back to the old methods the services of Mr. Coan would be beneficial to the company; that a contract somewhat similar had been in beneficial and successful operation for fifteen years, I would be constrained to hold that, even if the onus is on Coan to prove that the contract was a fair one and for the benefit of the company, tested by all these considerations this burden has been sustained.

It is very evident from all the testimony in this case that the old board in conjunction with Mr. Van Fleet were attempting to carry out methods which in their judgment would make this company larger and better and stronger but it is also evident as already stated by me that a difference of opinion exists as to whether the interests of the company are best subserved by going along under these methods or by a return to the old. I in no sense undertake to determine which is the best method. I do, however, determine that since Mr. Coan believed he was acting for the best interests of the company and that inasmuch as it

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appears that he had reasonable grounds for so believing and thus exercised his judgment towards the end sought by him this court cannot interfere and as no collusion or fraud with reference to the contract secured by him has been proven the contract cannot be set aside.

For all of these reasons the injunction heretofore granted herein must be dissolved and the petition dismissed and it is so ordered.

CONTRIBUTION TO JOINT DEBTORS.

[Superior Court of Cincinnati, Special Term, March 2, 1907.]

CHARLES W. DRAKE ET AL. v. GEORGE HEATLEY ET AL.

1. PURCHASE OF JOINT PROPERTY BY ONE JOINT OWNER, EFFECT OF.

Where property belonging to several different parties, but, standing in the name of one of them as title holder, is sold to satisfy the indebtedness upon it, and the proceeds being insufficient to meet such indebtedness a judgment is taken for the balance against the title holder, which he purchases for less than its face value in the name of his wife who is without an independent estate, the purchase will be treated as made by him in his capacity as trustee for the benefit of all interested with him in the property.

2. CONTRIBUTION BY JOINT DEBTORS.

The equitable rule, that losses are to be shared in the same proportion as benefits, will be applied to the losses from an undertaking from which the profits, had any been earned, would not have been shared equally, but in proportion to the several interests.

[For other cases in point, see 2 Cyc. Dig., "Contribution," §§ 8, 9.—Ed.]
[Syllabus approved by the court.]

Burch & Johnson, for plaintiffs.

A. C. Shattuck, for defendants.

HOSEA, J.

This is a suit to compel contribution, arising upon the facts as follows, briefly stated: On March 26, 1892, Mary J. Leeds was indebted to C. W. Drake & Co., \$345; to W. P. Leeds, \$588.88; to George Heatley, \$200—all without security—and to the Cincinnati & Suburban Building Association, \$5,500, the latter secured by mortgage on a certain lot of ground. Mrs. Leeds on said date entered into a written contract with Drake & Co., W. P. Leeds and Heatley, whereby the latter parties released their claims against Mrs. Leeds and assumed one-half of her mortgage debt to the building association, she conveying to C. W. Drake as title-holder one-half of the said lot, and the building association released their blanket mortgage to the portion conveyed, taking in lieu thereof a mortgage from Drake for \$2,750. The contract further provided that Drake & Co., W. P. Leeds and Heatley were to build houses

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on said property and sell the same, together with lots, and from the net proceeds thereof pay the accruing taxes, etc., the mortgage for \$2,750 and their own claims against Mrs. Leeds; and when all this should be accomplished the residue of the property should be reconveyed to Mrs. Leeds.

The contract provided for no distribution of profits to the three parties named beyond the satisfaction of their debts against Mrs. Leeds, but it appeared in testimony that they were building contractors and each expected to furnish materials and labor in their several lines. This fact furnishes an explanation of a moving incentive to the contract otherwise difficult to understand.

The contract scheme, however, failed from external and unexpected circumstances, and no houses were built. Mr. Drake, the trustee, continued paying on the mortgage, taxes, etc.,—the beneficiaries, W. P. Leeds and George Heatley, contributing from time to time as called upon in various amounts; but finally, being unable to carry the debt further, the building association mortgage was allowed to be foreclosed, the property sold and a judgment over for a balance of \$1,200 was entered against Drake, who now seeks contribution from his associates to equalize past disbursements and provide for payment of the said judgment.

It developed at the hearing, however, that the judgment against Drake had been bought in by him for his wife at the sum of \$300. There being no evidence that Mrs. Drake was possessed of an independent estate or income, or that she had acted independently in the matter for her own benefit, the purchase of the judgment must be treated as made by Drake in his capacity of trustee for the benefit of those whom he represented—in other words, as a compromise or settlement of the judgment for the lesser amount; and the benefit of the transaction, therefore, inures to all those liable to contribute.

The only remaining question in the case is as to the basis upon which the relative obligations of the plaintiff and defendant should be adjusted. It is claimed by counsel for Drake and urged with much force upon a citation of authorities that the parties are bound to contribute equally in thirds. The citations, however, relate to cases of joint enterprises whose profits and losses are to be distributed equally, or where, nothing being said to the contrary, the law will imply an equality of obligations and benefits.

The present case does not appear to be of this character. As already intimated, the contract, provided for no profit to be shared as such. Mrs. Leeds, in effect, loaned the half of her property to the three creditors upon a scheme whereby they, being building contractors, were to assume one-half of her debt to the building association, to build and sell houses and lots to an extent sufficient to reimburse themselves the amount paid for her said debt to the building association, the taxes, etc.,

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and to pay themselves as her creditors the respective amounts of their claims against her; and, this being done, to return the residue of the property to her. It is obvious that the extent of benefit the creditors could by possibility derive in carrying out the scheme of the contract was measured by the amounts of their respective claims. The expected benefit to be derived by them as individual builders in the construction of the houses was purely incidental and unmeasurable and cannot be considered in this connection.

The contract having failed through no fault of those concerned, the resulting loss is one to be shared by the parties according to equitable principles. But the equitable rule is, that losses are to be shared in the same proportion as benefits. While there was no distribution of profits as such provided for, yet each of the creditors was to have his debt paid, which was in the nature of a benefit, but these benefits were unequal in degree. The benefits being unequal, it would be manifestly inequitable to assess the loss in equal proportions, or, indeed, in any other proportion than the respective beneficial interests of the parties in the contract.

In lieu of a reference to a master to state an account it is suggested by way of saving expense that the parties agree upon a stipulation giving the balance ascertained upon the basis herein indicated, and file the same as a predicate for a final decree; in default of which, a reference will be ordered upon motion of either of the parties, and the hearing is further continued for this purpose.

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EASEMENTS—TELEGRAPHS AND TELEPHONES.

[Franklin Common Pleas, May 25, 1905.]

***WILLIAM T. BURNS V. COLUMBUS CITIZENS' TELEPHONE CO.**

DANIEL E. SULLIVAN V. COLUMBUS CITIZENS' TELEPHONE CO.

1. EASEMENT OF ABUTTING LOT OWNER IN STREET.

The dedication of a street does not deprive an abutting lot owner of any right therein not inconsistent with the paramount right of the municipality to hold and use the ground so dedicated in trust for street purposes. [For other cases in point, see 3 Cyc. Dig., "Easements," §§ 180-191.]

2. RIGHT OF ABUTTING OWNER TO THE SUBSOIL.

Among the rights retained by the abutting lot owner in that portion of his lot dedicated for street purposes is the right to the subsoil thereof, except as it may be needed for street purposes; and the use of such subsoil for the purpose of constructing conduits for the conveyance of telephonic communication is not embraced in the original dedication of the street, and imposes a new servitude.

[For other cases in point, see 3 Cyc. Dig., "Easements," §§ 180-191; 7 Cyc. Dig., "Telegraphs and Telephones," §§ 30-62.—Ed.]

[Syllabus approved by the court.]

Barton Griffith, for plaintiff.

F. A. Davis, for defendant:

DILLON, J.

Each of these cases involving the same question is presented to the court upon the sufficiency of the answers filed. It might be pertinent to inquire whether or not some of the denials of the answer should not be examined by the plaintiff as to whether any material allegations of the petition are denied and which will not be discussed on my consideration of this demurrer. I assume that the denials that the plaintiff has any easement in the soil in front of their premises and that the ditch and conduit when constructed will interfere with the plaintiff's enjoyment of the premises and the further denial that any damage of any kind will result to the plaintiff are legal conclusions and not intended to be considered by me upon this demurrer, and therefore I shall as briefly as possible confine myself to the main question which counsel have presented to me.

The dedication of the street in question to the municipality of the city of Columbus in law gave this street property to the city in trust for street purposes. The lot owner in addition to the ordinary rights of the public has special easement and special privileges for the use of his lot, not only for ingress and egress, but embracing perhaps every right not inconsistent with this paramount right of the city to hold and use this street in trust for street purposes. The vacation or abandonment of the same by the city puts the entire title or fee of the lot in the lot owner.

*Affirmed, *Burns v. Telephone Co.* 29 O. C. C. 000; without report, 76 Ohio St. 000.

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With this fundamental principle of law before us, we come to the great variety of opinion which have been adopted by the various Supreme Courts of the states of the Union as to what particular things are embraced in this trust of the city or in what may be termed street purposes.

As to the right of the defendant to lay a conduit for telephone purposes there is no question, and that question cannot be involved here. That right has been conferred upon it by the state, as well as by the municipality itself; the question is whether or not in exercising that right, it must in the present instance first resort to eminent domain, or, in other words, whether or not it violates any property right of the plaintiff in using a space a few feet cube through the soil in front of the plaintiff's property.

I shall not review the cases which have been presented, bearing on this subject. Some of the courts have construed the original dedication for street purposes so strictly that they could only embrace those purposes which were in the minds of the people themselves at the time of the dedication of the street. Manifestly, this limitation was incorrect. The dedication is for the uses and purposes of the street as the same at that time are construed to exist in legal contemplation, the law itself contemplating the things, purposes and uses for which that street was dedicated. Without this same construction, as a matter of law, our streets and alleys would remain confined to the original village purposes with the ox cart as the only means of travel, and with every other means barred. The broadest view taken by some courts is, that streets and alleys in legal acceptance and contemplation of the purposes for which they are dedicated, were for all general public uses for individual comfort. This would embrace all those purposes and conveniences which the modern society and civilization demand, such as the use of the street for water pipes, for gas, for electricity, for telephone, for hot water, and in some communities for fresh and cooled air, and with no limitation as to future demands of the public in the progress of civilization and public comforts. Probably the most recent discussion of this question will be found in *Mordhurst v. Traction Co.* 163 Ind. 268 [71 N. E. Rep. 642; 66 L. R. A. 105; 106 Am. St. Rep. 222].

Counsel for the defendant very logically, it seems to me, put the question on page 11 of their brief, and that is this:

"Is the use of the highway for the purpose of a telephone line within the scope of the original condemnation of the land or does a telephone line along a street constitute a new servitude or burden upon the soil?"

I feel, however, that it is not permitted me to give my opinion upon all the questions presented in the very comprehensive brief of defendant's counsel. The limitation is upon this court to confine itself to the ascertainment and declaring of the law as it exists in this state. I con-

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ceive it the special privilege and province of counsel for defendant present in *extenso* much of the argument of their brief to the tribunal whose special prerogative and privilege it is to modify or reverse former policy of the state on this question.

These distinctions of uses of the street are many of them exceedingly technical and almost artificial.

On the question of street railways we find at pages 267 and *et seq.*, of Lewis, Eminent Domain, a discussion of the author on doctrine that a street railroad is a legitimate street use provided road is devoted exclusively to street passenger traffic, but that if it use a car exactly the same size and dimension in which baggage is carried such use would be an additional burden. Doubtless the logic of this distinction of the courts was, that the carrying of baggage or freight was not a legitimate street use, and yet it must be confessed that people in all times have had the perfect right to haul freight, hay, grain and baggage in ordinary vehicles over the same street. And the author further says:

"A review of cases shows how conflicting and irreconcilable are the authorities. The weight of authority is, that a street passenger railroad laid on the surface or established grade of a street is the legitimate street use, while all other railroads are not. But what rational basis is there for a distinction between freight and passenger traffic? It cannot be denied that streets and highways have been established as much for the transportation of freight as for the movement of persons. It is a distinction which cannot be founded upon the nature and use of streets. Nor can any logical distinction be made between local and long distance traffic."

Upon this same line of argument, it might well be said that the use of the subsoil of a street for the conveying of communication between the citizens of a city is much less an interference with the rights of an abutting lot owner than laying a street car track on the surface of the soil, and it might be further well argued that in dedicating a street to the public, the expression "street purposes" might well include public purposes which of necessity and convenience should go along that street whether it be the mere moving of persons, the moving of traffic or the conveyance of the necessities and conveniences of life.

Recurring to our own state and its declared policy upon this subject, it must be admitted that the law seems now settled and from it we deduct two legal conclusions. First, that among the rights of an abutting lot owner consist the right to the subsoil in front of his house except as it may be needed for street purposes. And second, that the use of that same property beneath the surface of the street for the purpose of conveying telephonic communications and of laying wires for that purpose, is not embraced in the original dedication of the street. A

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the language is used by Judge Spear in the Callen case, "It is wholly for private use. Hence, it is not a street purpose."

I have arrived, therefore, at the same conclusion as to the Ohio law upon this subject as my associate in the case of *Federal Gas & Fuel Co. v. Townsend*, 14 Dec. 5, and the demurrers to the answers therefore will be sustained. Exception noted for counsel.

If counsel for the defendant wish to amend, ten days will be given for that purpose.

BURDEN OF PROOF—PATENTS—ROYALTIES.

[Superior Court of Cincinnati, Special Term, January 12, 1907.]

DOMINCK MCGOEN v. J. G. ELLERHORST ET AL.

PROOF NECESSARY TO RECOVER ROYALTY ON PATENT.

In an action for the recovery of royalties under a grant of right to manufacture an article covered by a patent, it is incumbent upon the plaintiff to show that the articles were manufactured in accordance with the patents in question and not in accordance with another device.

D. D. Woodmansee, for plaintiff.

H. P. Goebel, for defendants.

FERRIS, J.

The plaintiff brought an action upon a contract in writing attached to and made a part of his petition, wherein it was agreed that certain parties therein named were authorized to make stills under certain letters patent for such price as the constituent parties to the agreement might determine; and that in consideration of the permission to manufacture such stills under such letters, royalties were to be paid graded according to the capacity of the stills manufactured. And the plaintiff alleged that a large number of alcohol stills were manufactured by the defendants under said contract, and that thereupon the defendants became indebted under the terms of the contract to the plaintiff in the sum of \$7,800, no part of which has ever been paid.

The plaintiff therefore asks that an accounting may be had between the parties, and that upon such accounting judgment shall be rendered for this amount, and also asks for whatever equitable relief he may be entitled to under the proof.

The defendants answered, admitting the contract as set forth in exhibits "A" and "B," but denied any indebtedness under the contract for the reason that they claim that no stills were manufactured by them under the letters patent other than the one paid for, and that whatever was done by them in the manufacture of alcoholic stills did not fall under the provisions of the contract, but that said stills so

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manufactured by them were under and by virtue of an authority not derived from the letters patent as set forth on the petition.

Upon the issues as made by the pleadings, much testimony was introduced tending to show the real situation between the parties. That stills were made by the defendants the record leaves no doubt. If made under and by virtue of the contract, recovery could have been had only by the plaintiff assuming the burden of establishing the fact by a preponderance of the testimony, showing the character and kind of still manufactured, and the price obtained therefor, as a condition preceding recovery.

A great deal of testimony was introduced bearing upon the issues in the case, relating to both processes and results, the "thing used" and the "thing patented" and the devices that were "equally as good" or producing the same results, much of which testimony the court has concluded should have been discarded.

The action is a suit at law upon a contract for royalties under certain patents. The burden therefore was upon plaintiff to establish that the thing manufactured was in accordance with the particular patent. The letters patent indicate that they covered devices and not processes. And therefore it was incumbent upon the plaintiff to establish that the thing used was the thing patented; and it was incumbent upon the plaintiff to establish these facts by competent testimony, as in other cases, against the presumption that exists in favor of a defendant.

The processes of the law are for the assistance of the plaintiff in a case of this character, so that he could compel the production of books, exhibits and records; and it was within the power of the plaintiff to require the production of witnesses who could have made perfectly clear the contention of the plaintiff with reference to the essential features incident to this case; and only when he had exhausted such means should he have been satisfied. There the law stops.

In other words, it was for the plaintiff to have made out a case, not by clear and convincing testimony but, by testimony that would leave no reasonable doubt as to the conclusions that a chancellor is called upon to determine under the pleadings of the case.

The record now before the court shows the plaintiff's proof to be fatally defective in establishing those things without which there can be no recovery and indicates that a motion for a nonsuit should have been granted. It is plain that ownership of interest in patents involves no liability to co-owners for manufacturing; and that such liability may be contracted for on the basis of a partnership agreement. It is equally plain that the agreement or contract made the basis of this suit extended only to the life of the patents, since the right or title to

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inventions is given by law for limited periods only, to-wit, seventeen years under the present and recent laws. The last patent of the three specified in the agreement in this case, was issued on April 23, 1881, and therefore expired by limitation in April of 1898. Nothing therefore could be recovered for any article subsequently manufactured.

The plaintiff, however, was possessed of the idea that he could proceed in his recovery upon the theory that a "continuous still," however made, was within the scope of the patents. But this is a mistake, and the authorities do not justify such a conclusion, and it appears from the testimony that continuous stills existed a long time before the issuing of these letters, and that the patents in question covered mere detail improvements. Therefore it was, that the burden of proof required of the plaintiff that he show in each case that these details were manufactured; and this the testimony does not disclose.

There is proof tending to show that charges were made on the books for stills that were manufactured, of a size that does not appear, and the kind of still is not there shown, and therefore there would be no warrant for guessing in a matter where the contract had determined the amount of the royalty gauged upon the size of the still. If this court were to attempt to state an account upon such testimony the judgment would not stand. It is contrary to all of the rules that obtain in such matters.

Having examined the testimony throughout, and the pleadings under which the same was permitted, I am of opinion that the plaintiff has shown no grounds for recovery. Had I any doubt on the proposition that the plaintiff had failed to maintain the burden which the law casts upon him in this behalf, I would be relieved of such doubt by a reading of the testimony of the defendant, which clearly establishes to my thinking that the devices covered by the patents were abandoned, and that resort was had to other forms covered by what is known in the testimony as the Bardo patent. But I am not required except by way of meeting the suggestions of counsel to make this observation.

I am of opinion, therefore, that the plaintiff has not made out his case against the defendants, and that they are therefore entitled to a judgment, which is hereby given and costs assessed against the plaintiff.

CORPORATIONS—PARTIES.

[Superior Court of Cincinnati, General Term, January 10, 1907.]

Ferris, Hosea and Hoffheimer.

ARTHUR G. MORRISON v. S. A. STEVENS ET AL.

1. NECESSARY PARTIES IN ACTION AGAINST STOCKHOLDERS.

In an action against the stockholders of a corporation on their liability as such, the corporation is a necessary party defendant, and demurrer will lie for failure to so join.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 1109-1111.—Ed.]

2. SUFFICIENCY OF PETITION.

A petition that alleges merely that defendant is indebted to plaintiff does not state facts sufficient to constitute a cause of action.

ERROR to special term.

J. T. Harrison and W. W. Symmes, for plaintiff in error.

J. B. Kelley, H. L. Gordon, Drausin Wulsin and W. F. Chambers, for defendants in error.

PER CURIAM.

This is a proceeding in error to reverse a judgment of the court below in which the plaintiff in error was plaintiff and the defendants in error were defendants. Defendants filed a demurrer to the petition, which demurrer was sustained. It is sought to reverse that judgment below because the court erred in sustaining the demurrer. The case is of the same nature as the case of *Paul v. Groene*, and was heard with that case. The ground of the demurrer was a misjoinder of parties defendant, and that the facts set out in the petition did not constitute a cause of action. There may be some doubt on the face of the petition as to the first point raised by the demurrer, but it was admitted and argued upon the basis by the attorneys for both plaintiff and defendants that the defendants were stockholders in the Interstate Saving Investment Company, a corporation, and the petition did not make the said company a party defendant. We think the omission was fatal. It should have been made a party defendant, and therefore the demurrer was properly sustained upon that ground. The petition alleges merely that the defendants are indebted to plaintiff. We think that this is not enough, and does not constitute a cause of action, and that the second ground of the demurrer is therefore well taken.

It follows there is no error in the proceedings below, and the judgment is affirmed.

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CORPORATIONS—STOCKHOLDER'S LIABILITY.

[Superior Court of Cincinnati, General Term, January 2, 1907.]

Ferris, Hosea and Hoffheimer, JJ.

JOHN W. PAUL v. JOHN C. GROENE ET AL.

1. ACTION FOR PENALTY AGAINST CORPORATION BARRED IN ONE YEAR.

An action for recovery of money paid a debenture company is an action for a penalty and is barred under the statute in one year.

2. STOCKHOLDER NOT LIABLE FOR UNLAWFUL ACTS OF CORPORATION.

A corporation cannot be formed for an unlawful purpose, nor can a foreign corporation be admitted to do an unlawful business in Ohio; it follows, therefore, that a finding by the Supreme Court that a lottery business was being carried on does not render the stockholders of the corporation thus engaged liable therefor, and an action against the corporation and individual stockholders should be dismissed as to the stockholders.

ERROR to special term.

J. T. Harrison and W. W. Symmes, for plaintiff in error.

J. B. Kelley, H. L. Gordon, Drausin Wulsin and W. F. Chambers, for defendants in error.

PER CURIAM.

This is a proceeding in error to reverse a judgment of this court in special term in which plaintiff in error was plaintiff and defendants in error were defendants. All the defendants except the Interstate Saving Investment Company were sued individually, but the record shows they were stockholders of the corporation mentioned. The cause of action was one of those known as debenture cases. Two grounds of error are alleged:

First. That the court erred in ruling that the statute of limitation applicable to this case was one year, because the action was for a penalty.

The second ground of error alleged is, that the court instructed a verdict for all the defendants except the defendant corporation. We believe there can be no question but that the action was one for a penalty, and therefore no error was committed by the court in holding that the statute of limitation in the case was for one year. The testimony does not disclose that the Interstate Saving Investment Company was an illegal corporation. On the contrary, discloses that it was a duly incorporated company of West Virginia, and that it had complied with the laws of Ohio for the purpose of doing business in this state. It is contended that because the Supreme Court determined the business transacted by said corporation was a lottery, therefore the stockholders are liable. This does not follow. The corporation was organized to do a legal business. All that the stockholders could do and did do in

this case was to elect a board of directors, which board, under the law, was to transact whatever business was to be done by the corporation. There is no evidence showing that any of the defendants in whose favor a verdict was rendered by instruction of the court participated in the business of the company other than as indicated or had any knowledge of its illegal action. The presumption is, that the corporation was formed for a lawful purpose, and that its operation in Ohio was for a lawful purpose. A corporation could not be formed for an unlawful purpose, nor could the state of Ohio give permission to do anything unlawful in the state of Ohio. Inasmuch as whatever the company did as a corporation was done by the board of directors and not by the stockholders, the corporation and not the stockholders would be liable for the consequences of any illegality in their action. In this case a verdict was rendered against the corporation, and we think the court acted properly in dismissing those who are simply stockholders.

We find no error in the proceedings below, and therefore affirm the judgment of the court below.

ATTORNEY'S FEES—EXPERT TESTIMONY—VARIANCE.

[Superior Court of Cincinnati, General Term, January 7, 1907.]

Ferris, Hoffhelmer and Murphy, JJ.

(Judge Murphy of Hamilton common pleas, sitting in place of Judge Hosea.)

CINCINNATI & C. TRAC. CO. V. WALLACE BURCH ET AL.

1. HYPOTHETICAL QUESTIONS NOT BAD BECAUSE OF UNUSUAL LENGTH.

In an action for the recovery of attorney fees under a contract, it being incumbent upon plaintiffs to show what services had been rendered under the peculiar circumstances, hypothetical questions asked expert witness, must include all the facts upon which relief is asked, and the admission of such questions is not erroneous because of their unusual length.

[For other cases in point, see 4 Cyc. Dig., "Evidence," §§ 3337-3346.—Ed.]

2. UNDER GENERAL DENIAL PLAINTIFF LIMITED TO AVERMENTS IN PETITION.

Where the petition declares that plaintiff is entitled to recover a sum due them for professional services rendered to defendants, at its request, for which defendant promised to pay the reasonable worth thereof, to which the defendant responds by general denial, the plaintiff is limited by the terms of the contract as averred, and upon him rests the burden of establishing the agreement.

[For other cases in point, see 4 Cyc. Dig., "Evidence," §§ 1129-1139.—Ed.]

3. DEFENDANTS' PROOF DOES NOT PRESENT VARIANCE OF PLAINTIFF'S PROOF.

Having set up a contract that is silent as to the compensation plaintiffs were to receive for their services, testimony of defendants, tending to disclose a special contract in that the defendants agreed to pay the same as "we gave in the other corporation," does not present a variance between the pleadings and proof where the plaintiff's evidence shows by indubitable proof that the services were actually rendered, and at the request of defendants.

[For other cases in point, see 4 Cyc. Dig., "Evidence," §§ 3567-3574, 3610-3617; 6 Cyc. Dig., "Pleadings," §§ 1673-1717.—Ed.]

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ERROR to special term.

C. B. Matthews, for plaintiff in error.

Kittredge & Wilby, for defendants in error.

FERRIS, J.

The plaintiff in error was the defendant in the action below where recovery was sought for professional services rendered by the defendants in error. The petition alleged the rendition of services covering a period of twelve months during the year 1903, and up to March 1, 1904, under an agreement made between the parties. The plaintiffs alleged the value of such services and ask judgment for the amount against the defendant corporation. No motion nor demurrer was interposed; the defendant answered admitting the partnership but denying all other allegations. After a verdict a judgment was entered and proceedings in error are now instituted to reverse the same. The usual grounds for reversal are alleged but a special stress seems to be laid upon the fact that the verdict was excessive and that errors of law found in the charge were prejudicial to the plaintiff in error. Among other things this court is asked to set aside the verdict because of certain errors found in the admission of testimony by hypothetical questions of an unusually lengthy form and not in contemplation of law permitted.

Addressing ourselves to this last objection, it appears from a reading of the record that such questions were necessarily lengthy. The testimony covered a record of services rendered during the many months, was voluminous and so because of the facts in issue, it was incumbent upon the plaintiffs below to show what services had been rendered by them under the peculiar circumstances. The hypothetical questions must necessarily have incorporated all of the facts upon which the relief was asked, and in the very nature of things the plaintiffs found it necessary to incorporate the many services that had been rendered under the contract. We know of no rule of law that denies under such circumstances the submission to expert witnesses, of questions however lengthy that require a full statement of such facts as have been shown in testimony. There was no error in this. *Mayo v. Wright*, 63 Mich. 32, 43 [29 N. W. Rep. 832]; *Jones v. Portland (Vil.)*, 88 Mich. 598 [50 N. W. Rep. 731; 16 L. R. A. 437].

It is said that the verdict is excessive. The record in this case fully sustained the verdict of the jury. The nature of the employment and the demands made upon the plaintiffs below by the traction company called for the exercise of professional skill and experience in various lines, services that were to be rendered in this and other counties, and under the proofs we cannot say that the amount found due them under such proofs was excessive.

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But it is contended by the plaintiff in error that under the issues made by the pleadings no recovery in this case was possible. Our attention is drawn in this connection to the petition which declares that the plaintiffs below were entitled to recover a sum due them for professional services rendered to the defendant at its instance and request, for which the defendant promised to pay whatever such services were reasonably worth. This the defendant corporation in its answer denied. The plaintiffs therefore were limited in recovery by the terms of the contract or agreement as averred. Upon the plaintiffs rested the burden of establishing such agreement, and this they endeavored to do by competent testimony of themselves, by exhibits and proofs, and after introducing testimony of expert witnesses as to the value of such services thus alleged to have been rendered, they rested their case. The defendant corporation then called the director and officer of the company with whom a contract was made. He testified that the plaintiffs did render services for the company under an agreement, but that they were to be paid an amount such as "we gave in the other corporation." This was all the testimony offered by the defendant company as to the amount agreed upon. The plaintiffs denied such statement or agreement and further made it appear that no attempt had been made by the traction company to carry out such agreement. The plaintiff in error therefore claims that having declared on the contract, a recovery was limited to the contract as declared upon and that "the general denial is a defense merely and it is a defense that the defendant is entitled to have passed upon" (citing *Mehurin v. Stone*, 37 Ohio St. 49, and *Simmons v. Green*, 35 Ohio St. 104).

In *Mehurin v. Stone*, it was held, "If one pleads performance of a contract he cannot recover upon an alteration or a waiver." That is not this case and the principle there involved does not fit the situation. We are asked here under the circumstances of this case to find that as the plaintiffs below declared upon a contract, silent as to the amount only, the proofs showing no conflict in the testimony as to the rendition of the services, the testimony thus given tended to disclose a special contract and that this was a fatal variance between the allegations and the proofs. This does not follow. No special agreement limiting the price was sent up by way of defense, but the defendant below offered testimony tending to show such special contract or arrangement. The record shows by indubitable proof that the services for which recovery is asked were actually rendered, and were rendered at the traction company's request. There was no variance between the allegation and proof here. The plaintiff's proof tended to establish an agreement shown by practically uncontradicted testimony to be as alleged in their petition. The plaintiffs had said that no amount was agreed upon as to

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the value of the services, and the testimony tended to establish this fact. The defendant, under its general denial, sought to establish that there was an agreement fixing the value of the service rendered. Under these circumstances the trial judge said to the jury if they should—

“Find the fact to be, that the plaintiffs were employed upon a contract limiting the amount or sum to be paid and that was the contract between the parties, that sum would be the limit of your finding. If you should be satisfied that both the parties did arrive at an agreement by which these services were to be rendered for a specified sum, that sum should govern and your verdict will be accordingly. If, however, you should be of opinion that while the services were requested on one side and consented to on one side and were rendered on the other side without any specific agreement as to the amount, then, as said in the beginning, the law implies that the amount shall be the reasonable value.”

There was submitted to the jury, therefore, under these instructions for their determination, the question whether the contract as declared upon was silent as to the amount to be paid or otherwise, and the jury was permitted to say whether the defense made by the traction company that a contract expressing the amount had been entered into between the parties. The jury found no special contract, as the testimony of the defendant below sought to establish, but did find, as the plaintiffs contended, and thereupon proceeded to fix the reasonable value of the services that were rendered under the contract declared upon in the petition. The situation was fairly presented to them in the charge by the court, and we see no errors therein to justify reversal. We, therefore, affirm the judgment of the court below.

Hoffheimer and Murphy, JJ., concur.

Mullins Co. v. Roofing Co.

PLEADINGS—SALES.

[Hamilton Common Pleas, February 14, 1907.]

W. H. MULLINS CO. v. JACOB FREUND ROOFING CO.

1. STATEMENT OF CONDITIONS PRECEDENT AND PERFORMANCE.

While performance of all conditions precedent may be generally alleged in a pleading, the conditions themselves should be fully and accurately stated.

[For other cases in point, see 6 Cyc. Dig., "Pleadings," §§ 314-335.—Ed.]

2. PLEADINGS SIMPLIFIED BY INTERLOCUTORY MOTIONS.

A party may, if he can, use interlocutory motions to simplify a pleading for the purpose of attacking it on demurrer.

3. SUFFICIENCY OF STATEMENT OF CONDITION PRECEDENT.

The plaintiff need set forth primarily only such conditions as he thinks pertinent. If, however, the defendant can by referring to an exhibit show omissions, he is entitled to have these omissions embodied in the petition.

4. INCONSISTENT STATEMENTS STRICKEN FROM PLEADINGS.

An allegation of a sale by sample is inconsistent with a former allegation showing a sale by specific contract, and will be stricken out.

[For other cases in point, see 6 Cyc. Dig., "Pleadings," §§ 1502-1516.—Ed.]

5. IRRELEVANT INTERROGATORIES REACHED BY DEMURRER.

Interrogatories attached to a pleading which are irrelevant or not pertinent to the issue should be reached by demurrer.

[Syllabus approved by the court.]

MOTION to make definite and certain.

L. J. Dolle, W. C. Taylor and J. B. O'Donnell, for the motion.
Herrlinger & Southworth, contra.

PFLEGER, J.

The petition alleges that it furnished to the defendant a large number of metal window frames in accordance with the plans and specifications of an architect, to be used in the erection of the Pugh Power Building in this city under a written contract, which was attached to the petition as an exhibit.

1. The exhibit reveals a clause in the contract substantially providing that the money for these windows should be payable in installments upon the certificate of the architect certifying that the windows were furnished according to the terms of the contract. Although there is a general averment in the petition of the performance of all conditions on its part to be performed, as permitted under Rev. Stat. 5091 (Lan. 8606), there is an omission in the body of the petition of the condition referred to in the exhibit.

The defendant filed a motion to make definite and certain this petition by having included therein the omitted clause referred to, on the ground that it is a condition precedent. It is not denied that it is a condition precedent, but it is claimed on the other hand that the statute

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does not require the plaintiff to set forth every condition precedent, and that the exhibit cannot be examined on this motion any more than it could on a demurrer. As the amount involved is large, counsel have argued and briefed the matter with great care.

Most of the argument has been confined to the construction to be given to Judge Dempsey's two decisions, one in the case of *Lauer v. Insurance Co.* 10 Dec. 397 (8 N. P. 117), and the other in the case of *Block v. Distilling Co.* 10 Dec. 409 (8 N. P. 236). The rulings of the learned judge in these two cases is, briefly, that both under the common law and under our present code, all conditions precedent in a contract should be truly and properly set forth in the petition of the plaintiff, but not so with their performance. The *Lauer* case, involving the right to recover on an insurance policy, contained the material averments thereof but not all of the provisions of the contract. The policy was not attached as an exhibit. The court required this to be done. At the time the motion to make definite and certain was argued, the petition contained only such of the conditions precedent as the plaintiff saw fit to set up. In the case of *Block v. Distilling Co. supra*, the petition alleged that "among other things it was agreed," etc., and then followed such conditions as the plaintiff thought pertinent to the case. In both of these cases Judge Dempsey held that, merely because the defendant claimed that there were other conditions precedent, he could not force the plaintiff on a motion to make definite and certain other conditions than those which he disclosed in his petition, because the proof on the trial might develop that the plaintiff was right and that there were no other conditions precedent; that if the plaintiff falsely or carelessly omitted them in his petition he would be met with a failure of proof at the trial. There can be no doubt therefore that in both cases Judge Dempsey distinctly held that all conditions precedent should be fully, clearly and correctly pleaded.

The defendant had the right, if he could do so by the use of the interlocutory motion provided by our code, to compel plaintiff to simplify his petition and put it into such form as to make it fairly and properly the object of a demurrer if insufficient in law, rather than to wait for a trial on the merits. This was also his privilege at common law. The old forms of actions were the main instruments in determining the rights of parties, and caused the loss of many meritorious claims merely because the opposing counsel was more adroit in the framing of his pleadings and drove his adversary into false or unprofitable issues. To obviate this injustice our code utilized pleadings as the mere vehicle to the just determination of an action upon its merits, and permitted the court even after a verdict to conform pleadings to the proven facts. This abbreviation and simplification of pleadings was not intended, however, to permit the pleader to conceal any weakness in his case which he ought in all fairness reveal. If he sues upon a written

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contract, there is no reason why he should not set forth all his conditions precedent, no matter how numerous, because he agreed to perform all of them at the time he entered into his contract. He may, however, primarily set forth only such as he thinks pertinent to the issue and must attach his entire contract as an exhibit. The defendant may admit that all the conditions precedent in the contract were performed. In that event the necessity of such allegation in the petition is obviated. If the defendant however, claims that all these conditions precedent in the contract were not performed by the plaintiff he has the right (inasmuch as the burden at the trial is on the plaintiff to show compliance therewith or an excuse therefor) to compel the plaintiff to set them out in his petition and for that purpose he may examine the exhibit embodying the whole contract.

The object of Rev. Stat. 5085 (Lan. 8600), requiring evidences of debt for the payment of money to be attached to and filed with the pleading, is as Judge Gholson said in *Memphis Medical College v. Newton*, 12 Dec. Re. 382 (2 Handy 165), a substitute for oyer under the former practice, to compel the opposite party to give in advance copies of those instruments on which the action was founded and which he might have been required to produce under the former practice act. This is one reason why the exhibit not being a part of the petition cannot be looked to on demurrer. That does not hold true of a motion to make definite and certain.

Union Ins. Co. v. McGookey, 33 Ohio St. 555, was an action brought on an insurance policy which provided that notice of loss should be given forthwith.

The court said, page 561:

"The giving of notice of the fire to the company, being a condition precedent to be performed by the insured, must be averred; but, under Sec. 121 of the original code, 'in pleading the performance of conditions precedent in a contract, it is sufficient to state that the party duly performed all the conditions on his part.'"

In *Ashley v. Henahan*, 56 Ohio St. 559-570 [47 N. E. Rep. 573], it was held in a case similar to the one at bar that a clause in a building contract, that before payment is made the architect must certify that the work was done to his satisfaction, is a condition precedent and that the plaintiff cannot recover unless he shows substantial performance therewith or that the architect had fraudulently or unreasonably refused such certificate. 1 Kinkead, Code Pleading 407; *Weeks v. O'Brien*, 141 N. Y. 199, 203 [36 N. E. Rep. 185]; *Mehurin v. Stone*, 37 Ohio St. 49; *Moody v. Insurance Co.* 52 Ohio St 12 [38 N. E. Rep. 1011; 26 L. R. A. 313; 49 Am. St. Rep. 699].

The procurement by the plaintiff of the certificate of the architect required by the contract was a condition precedent. * * * and this

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condition should be pleaded and its performance alleged and proved. *Roy v. Boteler*, 40 Mo. App. 223; Swan, Code Pleading 516.

Although in *Grand Rapids Fire Ins. Co. v. Finn*, 60 Ohio St. 513, it was determined that no action was sustainable on a policy until a compliance of the assured with an appraisal as provided by the policy, and this clause was termed a condition subsequent, our Supreme Court, since the case at bar was submitted, overruled this case on January 23 last in the case of *Graham v. Insurance Co.* 75 Ohio St. 374, and held that this was a condition precedent, and in the absence of an award or a demand therefor no cause of action was shown, and that the burden of proof was on the plaintiff to show that he had performed such condition.

Plaintiff offers several authorities to sustain his contention.

The case of *Vail v. Insurance Co.* 67 N. J. Law 422 [51 Atl. Rep. 929], deciding that the plaintiff is not required to recite the conditions themselves, but may aver performance generally placing the burden upon the defendant to specify what conditions he intends to contest is based upon a peculiar statute of New Jersey permitting this to be done.

On page 425 the court said:

"It may be remarked in passing that under Sec. 126 the defendant must specially plead nonperformance of a condition precedent."

In *Penrose v. Insurance Co.* 66 Fed. Rep. 253, the court incidentally remarked that there might be an issue as to whether the exhibit was a copy of the contract sued on. It was not held, however, that the issue must be made by answer. The main question determined was that the exhibit could not be considered on demurrer.

It is evident from what has preceded that the motion to make the petition definite and certain by requiring the plaintiff to specifically allege that the architects furnished the certificate required by the contract, or make suitable allegations as an excuse therefor, should be granted.

2. The petition also alleges that contemporaneously with the entering into of this contract a complete sample window was furnished to the defendant and that said contract was entered into and made with reference to said sample, and that the same was described in the contract by apt expressions. The other allegations in the petition set forth substantially the terms of the contract, showing that the window purchased was minutely and particularly described in the written contract. No reference therein is made to a sample. The defendant moved to strike this paragraph out of the petition because it is inconsistent with the written contract and is practically setting forth evidence to vary the terms of a written instrument, and also to strike out the interrogatories addressed to the defendant, based on this sample window, on the ground that they are irrelevant and not pertinent to the issue.

A number of authorities are cited by plaintiff's counsel claiming

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that inasmuch as *Mehurin v. Stone*, 37 Ohio St. 49, determined that before a party could offer his evidence or have it considered as a matter of legal right, he should make the issue in the pleadings, therefore he might be precluded from offering this sample window at the trial. The necessity of thus setting it out does not establish the relevancy of the subject-matter to the main issue. It is urged that the evidence would be admissible because it merely tended to apply the writing to the subject-matter and showed the situation of the parties. The cases cited, however, are only applicable to the exceptions to the general rule, such as where there are latent ambiguities, or where uncertain terms are used, or where the subject-matter is not sufficiently identified. No such condition exists here. The window to be furnished is accurately and minutely described in the contract. If the sample window accords with the contract no objection could be made by opposite counsel. If it did conflict and it appeared that the sample was exhibited or referred to before, or contemporaneously with the entering into of the contract, it would violate the well known rule against the introduction of oral evidence tending to vary, alter or contradict the terms of a written instrument. In addition to this there is some doubt as to whether or not that which is pleaded is merely evidence.

For this reason the motion to strike out this allegation should be granted.

The motion to strike out the interrogatories applicable to the same subject should be controlled by the same principle, but it must be disposed of on the ground that it is not the province of a motion to strike out interrogatories. The proper remedy is by demurrer under the statute. The motion to strike out the interrogatories is therefore overruled.

EQUITY—ENJOINING JUDGMENTS.

[Licking Common Pleas, January Term, 1907.]

PETER KATSAMPOS ET AL. V. ELI HULL ET AL.

JUDGMENT OF LAW COURT ENJOINED BY EQUITY, WHEN REFUSED.

Equity will not enjoin the execution of a judgment, rendered by a court of law, when the defendant has slept on his equitable rights and permitted the law action, against him, to proceed to judgment without any effort to secure the aid of equity, in his defense, until after the matter has gone to final judgment.

[For other cases in point, see 4 Cyc. Dig., "Equity," §§ 481-546.—Ed.]

[Syllabus approved by the court.]

INJUNCTION.

Kibler & Montgomery and Fulton & Fulton, for plaintiffs.

Jones & Jones and B. F. McDonald, for defendants.

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SEWARD, J.

The case of Peter Katsampos and Crist Baruxes, as partners, v. Eli Hull *et al.*, is submitted to the court upon an application for an injunction. Counsel are familiar with the matter and the court will be very brief in what it has to say about the case.

This petition sets forth that a lease was made by Hull to the plaintiffs; that the contract was made November 17, 1902, to take effect March 1, 1903, and that on March 1, 1903, the plaintiffs in this action took possession under this lease as lessees of Hull; that the lease provides that they were to pay him \$2,100 per year for the premises—\$175 each month—and that he was to be paid on the first of each and every month; that, in order to make the property tenantable and remunerative, they put in some repairs upstairs; that the repairs amounted to \$1,400. They allege the death of Jemima N. Hull, the wife of Eli Hull, and that Eli Hull became the owner of the premises by virtue of the death of his wife.

They also allege that there was no north wall to the building; that the north wall was the south wall of the Pataskala building; that Hull had no rights in that wall, and that when the Pataskala building was torn down it left the property unprotected, leaving it in bad shape, and that they were put to great expense in putting a wall there, for protecting the building they were in, and the merchandise they had therein, and that they were damaged by virtue of that in the sum of \$800 and over.

The court does not think that should appeal very strongly to the mind of the court, because they have an adequate remedy at law for any such matter as that; but the question of what they did in putting the building in shape to rent, etc., might have some effect with the court if it were not for the fact that they did that, so far as the petition discloses, without any contract on the part of Hull in the matter; that they did that voluntarily.

That they paid the rent promptly on the first of each and every month until February 1, 1907, when they defaulted, but they say that there was a mistake; that Hull went in to get his rent, as he usually did, I suppose, on the first of each and every month, and they gave him a check on the Licking county bank, I believe it was, for \$175. That Hull took the check to the bank, and the bank refused payment; that Hull took the check in again on February 6, and payment was refused again.

They claim that they had no notice of this until after February 10; that is, that is the claim in the petition; February 10, was the first notice they had that the check was not paid. On February 26, Hull gave them notice to quit and surrender possession. They knew what that meant; they knew, when they had notice that this check was not paid, what it meant. If they did not know what it meant, they knew

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when this notice to quit was served, which precedes the right to bring an action in forcible entry and detainer. But, from February 10 until this suit was brought, they made no effort, although they knew and were notified, according to the petition, that the check had not been paid; they made no effort to pay Mr. Hull until after the suit in forcible entry and detainer was brought, which was on March 2. They let it go along and on March 4 they made a tender to Mr. Hull of the amount of rental, and the costs, and I think the rent for March also.

Now, they knew, at the time of the service of notice to quit and surrender possession, what kind of a defense they had to that proceeding. They knew, if they had any defense, it was purely equitable—a matter that could not be introduced in the trial before the justice of the peace—such a matter as is set up in this petition. I do not know whether it is proper to say that they permitted that judgment to be rendered against them, but it was rendered against them; so far as this petition discloses, they were not making any contest before the justice of the peace. It does not say that they made any defense, and probably they couldn't, because there was no remedy except in a court of equity. Now, notwithstanding this notice, knowing the kind of a defense that they had—that it was purely equitable and based upon the amount of money that they had expended in putting the property in shape, and other matters which are alleged in this petition,—they let this matter go to judgment. This court is asked to enjoin the execution of that judgment—to enjoin Hull from enforcing that judgment in the forcible entry and detainer suit. The court is not inclined to do it; because, if they desired to interfere with the proceedings before the justice of the peace, they should have come into this court before the matter went to final judgment. They had the time; they knew all about it, and they could not sit by and let the judgment at law be rendered, where the court has cognizance of the matter and to hear and determine it. If they had such a defense as is set up in this petition, they should have come to this court or to some court that had jurisdiction of it, and enjoined the proceedings in that case until this matter could be determined.

The court is not inclined to render a judgment in this case which would interfere with the judgment legally and properly rendered before the justice of the peace, and the court declines to grant this injunction. You have a right of appeal from the decision, I believe.

The court. Decree for defendant, dismissing the petition. Notice of appeal. The bond ought to cover the rent, I suppose, \$1,000.

Superior Court of Cincinnati.

OFFICE AND OFFICERS—ABUSE OF POWER.

[Superior Court of Cincinnati, April 27, 1907.]

KATE GALLAGHER V. CHARLES A. TOOKER.

WHEN PUBLIC OFFICER LIABLE FOR ABUSE OF DISCRETIONARY POWER.

A municipal building inspector is not liable for the abuse of his discretionary powers, unless it is alleged and proven that such act was prompted by a corrupt and malicious motive.

[For other cases in point, see 6 Cyc. Dig., "Office and Officers," §§ 459-461.—Ed.]

[Syllabus approved by the court.]

DEMURRER.

Millard Tyree, for plaintiff.

Wm. L. Dickson, for defendant.

HOSEA, J.

The petition shows that the defendant is the building inspector of the city of Cincinnati, and is charged with abuse of his discretionary powers in this, namely: In first ordering plaintiff's building to be taken down as being insecure and incapable of repair; and in subsequently, at the instance of plaintiff, consenting to and permitting repairs to be made and the building to stand. The plaintiff was delayed and subjected to loss of rents which she now sues to recover, upon the theory that the order to take down was an abuse of discretion.

This is not a sufficient basis for a claim of damages against an individual for the exercise of a discretionary power vested in him as a public officer.

It must be alleged and proved that the act was prompted by a corrupt motive and done maliciously under color of the official power, in order to hold the officer liable as an individual. The principle is general and founded on a recognized public policy. See *Stewart v. Southard*, 17 Ohio 402 [49 Am. Dec. 463]; *Gregory v. Small*, 39 Ohio St. 346; *Thomas v. Wilton*, 40 Ohio St. 516.

Demurrer sustained.

Bruck v. Insurance Co.

INSURANCE.

[Hamilton Common Pleas, April 19, 1907.]

A. W. BRUCK v. EUREKA FIRE INS. CO.

WHAT GOODS INCLUDED IN INSURANCE POLICY.

An insurance company carrying a policy of fire insurance on household goods and chattel property, "all contained in the above described dwelling," is not liable for the loss by fire of a toy patrol wagon while standing in the yard of the premises described, and near to, but not within, the dwelling, and which had never been kept in the dwelling.

[For other cases in point, see 5 Cyc. Dig., "Insurance," §§ 276-283.—Ed.]

MOTION for new trial.

P. S. Phillips, for plaintiff.

J. L. Kohl, for defendant.

WOODMANSEE, J.

At the trial of this case plaintiff offered in evidence a policy of insurance in defendant company covering certain chattel property of plaintiff—"all contained in the above described dwelling"—situated at No. 829 Dayton street, Cincinnati, Ohio. Plaintiff then proved the loss by fire, on July 4, 1904, and within the period of time covered by said policy, of one toy patrol wagon. The destruction of the property by fire and its value were not denied. Plaintiff's evidence discloses that the specific article at the time of the fire was not within the walls of the dwelling, but in the yard near the entrance to the cellar way. The plaintiff then having rested his case, the court, upon motion of the defendant, instructed the jury to return a verdict for the defendant, because of which plaintiff moves for a new trial.

The court holds that the policy of insurance did not cover property that was not in the dwelling. Counsel for the plaintiff insists that dwelling includes the yard about the building, with which this court cannot agree. A lease for a dwelling would doubtless carry its appurtenances, giving the lessee the use of the yard. But an insurance company in fixing its rate of insurance has a right to know the hazard it assumes. The policy in this case properly covers household furniture, and if an article of household furniture that was in a dwelling when insured had been temporarily placed in the yard, it would have raised a different question from the one before us, for in this case the article burned was not household furniture, and in fact was never in the building (dwelling).

A line of cases like that of *McCluer v. Insurance Co.* 43 Iowa 349 [22 Am. Rep. 249], holds that the words "contained in" are in the nature of a warranty that the article will be there when not temporarily absent for purposes incident to its use—as a carriage being in a shop

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for repairs or in its ordinary use outside of the building. But the rule certainly cannot in any case be construed to cover property that was never in the building nor intended to be in the building. If the word "dwelling" can be used in the broad sense claimed by counsel for plaintiff it would include everything in the yard surrounding the building. Certainly this is not the correct use of the term.

In the case of *Liebenstein v. Insurance Co.* 45 Ill. 303, the policy covered the "bake stock" of the insured "contained in a frame dwelling house and bake house front and rear, situated at No. 17 Thames street." It was held that such description did not include flour that was stored in a shed leading from the bake house to the front house. In that case the policy was intended to cover the bake stock, and the property described was a part of that stock, but the court held that it was not in a "dwelling," although in a shed leading from it.

The motion for a new trial is overruled.

MUNICIPAL CORPORATION—CONTRACTS FOR IMPROVEMENTS.

[Hamilton Common Pleas, April 23, 1907.]

*WILLIAM FOGARTY, A TAXPAYER, V. CINCINNATI ET AL.

DISCRETION IN AWARDING CONTRACT TO BIDDER.

In awarding a contract for a street improvement, a board of public service should exercise its discretion as to who is the lowest and best bidder, and not as to who is the lowest responsible bidder.

[For other cases in point, see 6 Cyc. Dig., "Municipal Corporations," §§ 1372-1384.—Ed.]

[Syllabus approved by the court.]

INJUNCTION.

Littleford & Ballard and A. D. Fennell, for plaintiff:

Expenditures of the board of public service in excess of \$500 must be made by written contract to the lowest and best bidder. Lan. Rev. Stat. 3131 (B. 1536-679).

Laning Rev. Stat. 3131 (B. 1536-679), confers upon the board of public service a discretionary power, in determining who is the lowest and best bidder, which cannot be reviewed by the courts unless their decision is arrived at by wrongful or fraudulent means, citing *Coppin v. Hermann*, 9 Dec. 767 (7 N. P. 6); *Coppin v. Hermann*, 9 Dec. 146 (6 N. P. 452); *State v. Hermann*, 63 Ohio St. 440 [59 N. E. Rep. 104]; *Columbus v. Board of Pub. Serv.* 14 Dec. 715.

The discretion exercised by the board of public service must, however, be a sound discretion, based on reason and fact, and not arbitrary.

*Affirmed, by circuit court, June, 1907.

Fogarty v. Cincinnati.

Coppin v. Hermann, 9 Dec. 767 (7 N. P. 6); *Coppin v. Hermann*, 9 Dec. 146 (6 N. P. 452).

Taxpayer may bring suit in his own name on behalf of a corporation. Rev. Stat. 1778 (Lan. 3281; B. 1536-668).

Motive of plaintiff, whether a bidder on contract or not, of no effect. *Mathers v. Cincinnati*, 7 Dec. Re. 521 (3 Bull. 709); *Raynolds v. Cleveland*, 24 O. C. C. 215.

G. H. Kattenhorn, for the city.

O'CONNELL, J.

This is an action brought by Wm. Fogarty, as a taxpayer, to restrain the city of Cincinnati from entering into a contract with James Agness for the improvement of Highland avenue from Liberty street to Channing street.

After reciting the preliminary steps taken by the board of public service leading to the award of the contract the plaintiff, as the basis of his action, says:

"That the board of public service by its members aforesaid could not exercise any discretion in determining who was the lowest and best bidder other than by ascertaining whose bid was the lowest in cost, providing that said bidder was a responsible person.

"Plaintiff says that the board of public service in declaring the defendant, Agness, the lowest and best bidder, acted arbitrarily, not in good faith and not in the exercise of any discretion."

The court is unable to agree with the first proposition advanced by the plaintiff, that the board could not exercise any discretion except to ascertain who was the lowest bidder and award the contract to said lowest bidder.

This claim negatives the words of the statutes "and best." If all that were necessary were the mathematical calculations, and then the board of necessity must award the bid to the lowest as shown by the results of the calculations, why the words "and best." Under the plaintiff's contention they are surplusage; with this the court cannot agree.

There is a wide distinction between the "lowest and best bidder" and the "lowest responsible bidder." A man may be responsible financially and able to carry out his contracts and yet not be by any means the "best" bidder to award a contract to, when the elements of punctuality, covert use of improper materials, tendency to slight the work unless keenly watched, etc., are also to be taken into consideration.

The court finds that the plaintiff has failed to establish the allegations of his other contention, to wit, that the board in declaring Agness the lowest bidder "acted arbitrarily, not in good faith, and not in the exercise of any discretion." The court finds from the evidence that the board did not act arbitrarily; that it acted in good faith, and that it

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acted with that discretion which the law contemplates it should use, when it granted it the power to determine who is "the best" bidder.

No case has been made out justifying the interference of a court with that discretion which is lodged in public boards in the matter of the award of contracts such as is involved in the case at bar.

Under all the circumstances of the case I do not think the plaintiff should be permitted to amend his petition by adding the phrase that he brings it "on behalf of the corporation."

The motion of the defendant for judgment will be granted.

CONSTITUTIONAL LAW—INTOXICATING LIQUORS.

[Superior Court of Cincinnati, General Term, February 19, 1907.]

Ferris, Hosea and Hoffheimer, JJ.

MARTIN DOERING ET AL. V. CINCINNATI (CITY) ET AL.

VALIDITY OF JONES LOCAL OPTION LAW.

The petition feature of the Jones law (98 O. L. 68; Lan. 7283a *et seq.*; B. 4364-30a *et seq.*), does not, in providing for an election not by ballot, render the act unconstitutional; nor is it invalid for lack of uniformity of operation, or because of the method provided for a review as to the sufficiency of the return made.

[For other cases in point, see 3 Cyc. Dig., "Constitutional Law," §§ 1788, 1789.—Ed.]

R. B. Smith, Albert Bettinger, A. J. Freiberg, C. A. Groom and Cohen & Mack, for plaintiffs.

W. B. Wheeler, for defendants.

PER CURIAM.

The contention in this case [Martin Doering and Thomas J. Logan, taxpayers on behalf of the city of Cincinnati v. City of Cincinnati, Edward J. Dempsey, Mayor; William C. Culkins, Auditor, and Jacob Wel-
ler, treasurer of the city of Cincinnati] involves as a controlling question the constitutionality of an act passed by the general assembly March 22, 1906, and commonly known as the Jones law. 98 O. L. 68-75 (Lan. 7283a *et seq.*; B. 4364-30a *et seq.*). We have carefully considered the petition feature of the law, which plaintiff claims is illegal, because it is an election, not by ballot; and we have likewise considered the objection directed to the method provided in the law for a review of the sufficiency of the return as made, as well as the alleged lack of uniformity in the operation of the law. All of which has been considered with reference to the provisions of the constitution, which it is claimed the law under discussion violates. Although the questions raised by petitioners as to the unconstitutionality of this law are not free from doubt, yet we recognize the rule existing in such matters that requires the benefit

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of the doubt to be given to the law; and that a law duly passed by the general assembly shall not be declared to be in conflict with the constitution of the state unless it shall so clearly appear as to constrain us so to declare our judgment. 26 Am. & Eng. Enc. Law (2 ed.) and numerous cases cited, n. 1, 2, 3.

We are not unmindful of the existence of some decisions in our state which would seem to indicate a plenary power in the general assembly by virtue of schedule 18 of the constitution of 1851 to deal with the subject-matter involved in the Jones law, and without reference to any constitutional limitation. And yet we are not justified in determining from such decisions the full extent to which such legislative power may lead. Being in doubt therefore as to such limitation, we are required, in view of the well-established rule to which we have referred, to resolve our doubts in favor of the law and to pronounce in favor of its constitutionality.

After reviewing the cases cited we deem it sufficient to say that the objections urged are not so clearly sustained as to justify us in holding the law unconstitutional as against the presumptions raised by the well-established rule in its favor. We must, therefore, deny the prayer of the petition, and as this practically determines the controversy, judgment should be entered dismissing the petition, and it is so ordered.

Judgment for the defendants dismissing the petition.

COUNTER FLOORS—NEGLIGENCE—PROOF.

[Superior Court of Cincinnati, General Term, 1906.]

Ferris, Hosea and Hoffheimer, JJ.

ANNA F. O'CONNELL, ADMX. v. L. P. HAZEN ET AL.

1. NO PRESUMPTION OF NEGLIGENCE FROM ACCIDENT.

Where the deceased fell from a point in a building, under construction, to a floor below, no presumption of negligence, on the part of defendant, is raised by reason of Rev. Stat. 4238-20 (Lan. 7420) which requires owners and contractors to provide counter floors in building in the course of construction.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 539-546.—Ed.]

2. NEGLIGENCE MUST BE SHOWN BY DIRECT EVIDENCE.

To sustain an action for injuries caused by alleged negligence, it must be shown that the cause of the injury complained of resulted from some culpable negligence of defendant.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 552-568.—Ed.]

ERROR to special term.

Shay & Cogan, for plaintiff in error.

Cohen & Mack, for defendants in error.

Superior Court of Cincinnati.

PER CURIAM.

Error is prosecuted in this case to the action of the court in sustaining a motion to instruct a verdict for defendant. It appears from the record that plaintiff's decedent fell from the higher part of an iron frame building under construction to a floor below.

As no one saw him fall, the cause of the fall is purely a matter of conjecture. It is argued by plaintiff in error that the cause was the absence, upon such elevated portion of the uncompleted structure, from which he fell, of the joists and flooring required by Rev. Stat. 4238-20 (Lan. 7420); but even if this presumption is tenable, there is no proof tending to show that such portion of the building was in the condition provided by the statute for its operation, and consequently no presumption of negligence against the defendant can arise therefrom. A recovery cannot rest merely upon proof of an act of defendant as the proximate cause of the injury; but it must also be shown that such act resulted from culpable negligence by defendant. *Railway v. Marsh*, 63 Ohio St. 236 [58 N. E. Rep. 821; 52 L. R. A. 142]; *Cleveland City Ry. v. Osborn*, 66 Ohio St. 45 [63 N. E. Rep. 604].

In the absence of such proof it was the duty of the court to grant the motion, and it would have been error not to do so. *Ib.*

Judgment affirmed.

State v. Smedes.

JUDGMENTS AND DECREES—JUSTICES OF THE PEACE.

[Hamilton Common Pleas, May 20, 1907.]

STATE EX REL. JOSEPH SPECTOR V. J. M. SMEDES.

1. WHEN JUSTICE'S JURISDICTION OVER A CAUSE CEASES.

A justice of the peace has four days within which to determine a case submitted without a jury under Rev. Stat. 6579 (Lan. 10161). He has no jurisdiction after such time to set aside a judgment entered on his docket. Nor is a motion for new trial permissible in such case.

[For other cases in point, see 5 Cyc. Dig., "Justices of the Peace," §§ 307-312.—Ed.]

2. MANDAMUS TO COMPEL JUSTICE TO ISSUE EXECUTION.

Mandamus will not issue to compel a magistrate to issue an execution before the expiration of ten days after entering judgment under Rev. Stat. 6648 (Lan. 10231), and within which the judgment debtor has the right to file an appeal bond.

[For other cases in point, see 5 Cyc. Dig., "Mandamus," §§ 107-114.—Ed.]

MANDAMUS.

Kelley & Hauck, for plaintiff.

J. M. Smedes, for defendant.

FFLEGER, J.

On May 11, 1907, the defendant, John Marshall Smedes, a justice of the peace, after having heard a case involving the warranty of a horse, rendered a judgment in favor of the plaintiff, Joseph Spector, for \$44.62, and against one Joseph Steuter. As the successful litigant left the court room he made some alleged damaging admission. Opposite counsel immediately filed a motion for a new trial on the ground of newly discovered evidence. On May 16, against the protest of plaintiff's counsel, the magistrate granted a new trial and set the case for May 20. On May 17 the plaintiff demanded an execution which the justice refused. He thereupon brought this suit in mandamus to compel the magistrate to issue the execution. The case involves the right of the justice to entertain a motion for a new trial in a case tried without a jury under Rev. Stat. 6560 and 6579 (Lan. 10142, 10161).

Revised Statute 6560 (Lan. 10142) permitting motions for new trial on certain ground is applicable to jury cases. Revised Statute 6579 (Lan. 10161), provides that in cases other than where the defendant has been arrested or his property attached the justice must, if the case be tried without a jury, enter judgment either at the close of the trial, or if he desires further time to consider, on or by the fourth day thereafter, both days inclusive. In the case at bar the magistrate entered the judgment on May 11, and on the fifth day thereafter heard the motion and set aside his former judgment.

In *Derby v. Heath*, 59 Ohio St. 54-59 [51 N. E. Rep. 547], it was determined that while justices' courts are recognized by the constitution.

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the magistrate's power and duties are limited by the statute, and the statute having prescribed that the magistrate shall enter his judgment within a certain number of days, his order after such date, setting the same aside, is absolutely void. *Nicholson v. Roberts*, 6 Dec. 233 (4 N. P. 43).

Our circuit court, in *Yager v. Griess*, 1 Circ. Dec. 296 (1 R. 531-532), decided that there was no provision in the statute for the filing of a motion for a new trial in a case tried by the justice alone. Had his action not been entered upon his docket although pronouncing final judgment, there can be little doubt but that he could have changed his mind within the four days provided by Rev. Stat. 6579 (Lan. 10161). His judgment having been entered, however, he had no control over the same on the fifth day thereafter and his action to hear and determine a motion for a new trial and setting his former judgment aside was *coram non judice* and void.

A judgment debtor has ten days to file an appeal bond. Under Rev. Stat. 6648 (Lan. 10231), it is discretionary with the justice to issue execution at least before the ten days expired. Revised Statute 6742 (Lan. 10335) distinctly provides that the writ shall not be issued to control judicial discretion. As the ten days will not expire until May 21 next the magistrate may refuse to issue execution until after that time.

The application for a writ of mandamus is therefore premature and will be denied at plaintiff's costs.

CONFLICT OF JURISDICTION—RECEIVERS.

[Superior Court of Cincinnati, April 8, 1907.]

CAROLINE A. CALDWELL v. GERMAN NAT. INS. CO. OF CHICAGO.

RIGHT OF FOREIGN RECEIVER TO PROPERTY IN THIS STATE.

Comity between states does not afford a sufficient basis for permitting a foreign receiver to intervene for the purpose of sequestering property or funds which have been brought under the control of a court of this state on behalf of a citizen of the state in an action on a contract made and to be performed in the state.

[For other cases in point, see 2 Cyc. Dig., "Conflict of Jurisdiction," §§ 41-45; 7 Cyc. Dig., "Receivers," §§ 398-408.—Ed.]

MOTION for leave to file cross petition.

L. H. Swormstedt, Morrow & Gillett, for plaintiff.

Kittredge & Wilby, G. P. Stimson, for receiver.

HOSEA, J.

In this case it appears from the papers filed that Mrs. Caldwell effected insurance, through the Sears insurance agency at Cincinnati, on a house owned by her in Cincinnati on June 28, 1906, for the sum

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of \$1,000; the premium was duly paid; the house was destroyed by fire October 30, 1906. The loss was duly adjusted within sixty days and ascertained to be \$585, and not being paid suit was brought on the policy in this court on January 16, and summons and an order of attachment and garnishment duly issued and served on the Sears Insurance Agency Company who answer on January 26, acknowledging money in their hands belonging to the defendant company to the amount of \$851.37. The insurance company is in default for answer.

The State Bank of Chicago, alleging itself to be receiver of said company, on March 30, 1907, presents and asks leave to file a cross petition setting forth in substance that on November 20, 1906, it was appointed receiver by the circuit court of Cook county, Illinois, at the suit of the Chicago Title & Trust Company; and that pursuant to the order of said court the assets of said insurance company were assigned to said receiver; and that it took possession of said assets including the debt owing by the Sears Insurance Agency Company of Cincinnati (the garnishee in this present action), to the amount of \$1,412.99, and that same is being held by the said Sears agency for said receiver, subject to any offsets due. The receiver claims that its appointment and the assignment were made for the equal benefit of all creditors of said insurance company, of whom the present plaintiff is one; and claims that the debt garnisheed in this case was the property of the receiver and that the interest of the receiver therein is paramount to that of the present plaintiff; and prays for discharge of the attachment, recovery of the money and its costs.

The question thus presented has relation to the propriety of permitting a foreign receiver to intervene in this action and sequester property already in the control of the court in behalf of a citizen of this state.

It is well settled that a receiver appointed by a state court has no extra-territorial rights, for the reason that the orders and decrees of the appointing court from whom his powers are derived have no force beyond the court's jurisdiction, except under the national constitution and laws not involved in this case. Alderson, Receivers Sec. 228.

In a word, the order of the Illinois court made in the cause stated and under the laws of that state did not operate to divest any title or interest of the defendant company in property of any description within this state, or prevent any legal remedy, directed against that property for the satisfaction of a debt, being enforced. 2 Kent's Commentaries 329.

The power of a foreign receiver to sue or intervene in a suit pending in this state can only exist as a privilege based on the general comity of states, which is a rule of courtesy and favor recognized and enforced between the courts of several states (*id.*), the only limitation being that the courts of Ohio, while allowing the comity of a suit on

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a contract not in contravention of our laws or public policy, will protect the rights of our own citizens and will not allow the principles of comity to defeat or impair those rights. *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174, 180.

The cause of action involved in the present case is a contract made and to be performed in Ohio. The contingency which is the basis of the contract having occurred and all conditions having been performed by plaintiff, the debt became due before the appointment of the receiver, although the precise amount remained to be ascertained by due process of adjustment. It is manifest from the proposed cross petition that the receiver has not reduced the money in the hands of the garnishee to actual possession. The allegation that it "took possession of the assets of said German National Insurance Company, and, among others, the debt due from the Sears Insurance Agency of Cincinnati," and that said agency "held said sum for the receiver," states only conclusions of law and moreover clearly implies no attempt to reduce the possession in fact—as by collection—as late as March, 1907.

It is true that one of the judges of this court at an early day (1856) held that while the mere notice by a foreign receiver to a debtor would not avail as against a subsequent local attachment, yet that a promise by the debtor to pay in response to such notice would defeat a subsequent attachment by virtue of the principle of novation. *Finnell v. Burt*, 12 Dec. Re. 403 (2 Handy 202).

With all respect to the memory of the distinguished judge rendering this opinion, it is difficult to see how the doctrine of novation applies. There is here no substitution of a new debt for the old, nor anything more than an expression of willingness to pay the old debt to a personal representative of the creditor, and being without consideration could not be enforced as a new contract.

The same judge when later upon the Supreme bench seems to have recognized the *non sequitur* involved in the holding, and took occasion to refer to this principle—in another connection—as "plausible," and to supply for it a totally new foundation of reasoning.

"The very foundation of the principle," says the court, "assumes that there was jurisdiction over the person, and is in no respect based upon a jurisdiction over the thing." *Owen v. Miller*, 10 Ohio St. 143 [75 Am. Dec. 502].

But this principle does not seem to have survived the test of the later discussion. In *Fuller v. Steiglitz*, 27 Ohio St. 355 [22 Am. Rep. 312], a resident of Ohio sought to sequester by virtue of an independent cross demand not due, a debt in this state, as against a New York assignee; and the court held that, having no valid claim to reach and appropriate this account as against the assignee the rule of comity must

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prevail in favor of the assignee. But in the discussion it is said, page 365:

"If, by attachment or otherwise, this account had been seized, and a lien or charge established against the same under Ohio laws, by a citizen creditor of Smal, the question decided in 13 Mass. 146, would have been presented here for decision."

The case referred to is *Ingraham v. Geyer*, wherein it is said that "a citizen who had actually seized the debt by attachment before it was paid to the assignee would be protected in his lien."

In the same discussion is also cited with approval the leading case of *Oliver v. Townes*, 14 Mart. (La.) 93, wherein the exception to the rule of comity is thus stated:

"Where the laws of a foreign state interfere with the rights of citizens of the country where the parties to the contract seek to enforce it, as one or the other must give way, those prevailing where the relief is sought must have the preference."

So in the case of *Merchants Nat. Bank v. McLeod*, *supra*, the conflict arose over mortgaged property coming into the physical possession of a Kentucky receiver, and afterward (being temporarily in Ohio) attached by another citizen of Kentucky. The court in decreeing the paramount right of the receiver by virtue of the mortgage lien and prior physical possession, said:

"The attaching creditor acquired no right or interest by the seizure, paramount to the mortgages. Had it appeared that an interest in the property was acquired by the seizure, a different and somewhat difficult question would have been presented, namely, Would the Ohio court retain the property, until this interest was ascertained and protected? If the attaching creditor was a citizen of Ohio, the principle, that our courts would protect its own citizens, would seem to apply, but treating the mortgages as valid, no such interest existed, or could be acquired by the levy of the attachment, as the property was insufficient to pay the debts secured by the mortgages."

Again, in the same case the court cite what is stated to be the correct rule, namely:

"It (the right of a foreign receiver to sue) could not be exercised in such foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government, to retain in its own hands the property of a debtor, until all domestic claims against it are satisfied.'"

In considering the matter from the standpoint of equity, it appears: (1) That the proceeding in Illinois in which the receiver was appointed was not a voluntary assignment but *in invitum* and compulsory, at the instance of an Illinois creditor; (2) that the debt claimed by the receiver is not a liquidated one but an amount "subject to any

offsets that might be due" to the debtor, and that it has not yet been liquidated; (3) that the debt due the present plaintiff accrued before the appointment of the receiver under terms of liquidation provided for in the creation of the debt, the carrying out of which terms prevented an earlier filing of plaintiff's action and hence enabled the Illinois creditor to secure the receiver's appointment some days before the present suit was filed.

Our courts would—and should—readily lend aid to a foreign receiver to reduce debts or other property in this jurisdiction to possession; but to permit a receiver who has taken no such steps in his own behalf to intervene at a late day in a suit already in progress by a citizen of our own state upon an obviously just claim, wherein a lien has already been obtained through proper enforcement of our own laws, for the purpose of defeating these rights and removing the property already in custody out of reach of our courts into a foreign jurisdiction, requires a very much stronger showing than appears or can appear in this instance. It must appear that prior to the local attachment the property had been actually reduced to physical possession as in *Merchants Nat. Bank v. McLeod*, *supra*; or that the foundation of the attachment was invalid, as in *Fuller v. Steiglitz*, *supra*; or that at least there is a superior equity.

In the present case there is neither legal nor equitable ground for permitting the intervention.

The question has been decided by our circuit court under conditions even more favorable to the receiver. *Wilson v. Gifford*, 5 Circ. Dec. 680 (12 R. 597); see also *Manhattan Co. v. Steel Co.* 1 Dec. 286 (31 Bull. 100); *Besuden Co. In re*, 5 Dec. 565 (7 N. P. 538); *Parkinson v. Bank*, 5 Dec. Re. 317 (4 Am. L. Rec. 401).

There is authority for permitting a receiver to intervene as the representative of the defendant to see that his rights are protected, but that is not the purpose of the present application. *Matthar v. Conway*, 2 App. Cas. D. C. 45.

The present application must be refused and it is so ordered. Leave to file cross petition denied.

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FRANCHISE — MUNICIPAL CORPORATIONS — STREET RAILWAYS.

[Cuyahoga Common Pleas.]

WOODLAND AVE. & WEST SIDE ST. RY. v. CLEVELAND (CITY) ET AL.**1. IMPAIRING CONTRACTUAL OBLIGATION BY SUBSEQUENT ORDINANCES.**

A renewal ordinance granting to a street railway company the right to operate upon certain streets constitutes a contract between the municipality and the company, the obligations of which cannot be affected by subsequent legislation; and where such ordinance provides that the street railway company pave between the rails of its tracks it cannot, by a subsequent ordinance, be required to pave the "devil strip" or space between double tracks.

[For other cases in point, see 7 Cyc. Dig., "Street Railways," §§ 28-72; 6 Cyc. Dig., "Municipal Corporations," §§ 1018-1028.—Ed.]

2. EXTENT OF OBLIGATION TO PAVE BETWEEN TRACKS.

By an ordinance, granting a renewal franchise to a street railway, providing that the latter shall pave its tracks between its rails whenever the street is improved, the obligation of the company is to pave only between the rails and not to the end of the ties, nor does a provision in such grant subjecting it to future legislation of the municipality affect the contractual rights of the company in any way save as may be necessary by police regulation.

[For other cases in point, see 2 Cyc. Dig., "Constitutional Law," §§ 419-441.—Ed.]

APPLICATION for injunction.

HAMILTON, J.

The case of the Woodland Avenue and West Side Street Railway Company against the City of Cleveland, George W. Gardner, mayor, and J. W. Schmitt, superintendent of police, is before the court upon an application for an injunction.

In brief, the allegations of the petition are, that the Woodland Avenue and West Side Street Railroad Company is the successor of the Kinsman Street Railroad Company, which was chartered many years ago, and that, in 1879, on the expiration of the charter of the Kinsman street road, it expiring after a lapse of twenty years for which it was originally granted, a renewal ordinance was granted, and, by the terms of the renewal ordinance, it is said it was provided that—

"Whenever it shall be deemed necessary to grade, pave or improve any of the streets wherein said tracks are laid, the company shall be required to pave any part or all of the track between the rails with gravel, stone or other pavement as the council may deem proper, and, if said company, after reasonable notice, shall fail to do such paving at the same time with any such street or streets being so improved by said city, or at the time named in such notice, then said city may do such paving and assess the cost of such paving against said company in the same ordinance with the property owners on said street, or by a sep-

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arate ordinance, and may collect the amount thereof by suit or otherwise, according to law, and said company is also required to keep said pavement in constant good order; said paving and repairing to be done under the direction of and to the acceptance of the board of improvements."

It then avers that it has at all times complied with the provisions of the ordinance under which the renewal of the grant was effected.

It further avers that, in 1889, the city came to the conclusion, and so expressed itself by way of resolutions and ordinances, again to pave Woodland avenue between Wilson avenue and East Madison avenue; that they passed the necessary ordinance to repave, and required thereby the plaintiff company to pave between the rails, and assessed upon the property owners adjoining this street sufficient to pay for the improvement, less the space between the rails—that is, less the intersection which the city at large would pave; that the money was paid into the treasury by the property owners, and that the plaintiff company paved its tracks as required or substantially did so; that some time in June, 1890, the city passed another ordinance, by which they amended the assessing ordinance, and therein provided that this street railroad company should pave not only its track between its rails, but should pave what is known as the "devil strip," the space lying between its two tracks.

Against this action of the council they protest, and insist that, by the terms of the contract as provided in the renewal ordinance, they were bound only to pave their tracks between their rails, and that the city has no authority or right to require more of them; this renewal ordinance being an ordinance which was accepted by the plaintiff company, and was, by its terms, to continue in force for twenty-five years; that it is, therefore, a contract between the city and this plaintiff company, and cannot be abrogated by the city; but the city claimed this right, and, having passed such an ordinance, and the railroad company refusing either to pave this additional strip itself, or to pay the cost and expense of it to the city, the city then passed a resolution forfeiting the rights of this plaintiff company under its charter or under the ordinance renewing its rights, until such time as the company should comply, and directed the mayor to issue his order to the superintendent of police to prevent the street railroad company from running its cars, or in any manner using this strip of ground for the propelling of its cars over it until it complied with the provisions of this ordinance by paving or paying for the paving of this disputed strip of ground.

It says that all this was in violation of the rights of the company, and that it is a substantial interference with the contract rights of this company; interferes with its business; breaks it up, and interferes with and discommodates the patrons of this railroad company who are in the

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habit of using this road for going over this space or territory, and hence it asks an injunction at the hands of this court to prevent this state of things from continuing.

The city, by way of answer, admits that there was a renewal ordinance in 1879 granted to this company or to its predecessors; admits the passage of the ordinance of 1889, for paving this street; admits the passage of the ordinance in June, by which it required the plaintiff company here to pave this "devil strip," so-called, and admits the passage of the resolution by which it seeks to forfeit the rights of the company for noncompliance with that ordinance, and admits the taking possession of this road by its officers, the police force of the city, and the preventing of the running of its cars.

It, however, denies that the plaintiff company has the contract rights which it claims, and expressly claims that this renewal ordinance was subject to the general railroad ordinance passed for the government of all railroads, and that, by its provisions, and by the provisions, perhaps, of the ordinance of renewal itself, it was to be subject to all future legislation of the city in respect to that road.

They further say that, by the provisions of the charter of 1879, on failure to comply with that ordinance and with the former general ordinances the city reserved to itself the right to pass a resolution declaring a forfeiture of the rights of the railroad company to run its road, and to take possession and prevent the exercise of its rights.

There is no controversy as to the fact that they did pass the ordinance of 1889 for the repavement of this street, requiring the railroad company to pave the space between the rails of its tracks, and that subsequently they passed this requirement that it do more than that: to wit, pave the "devil strip."

They further say that, whether that be so or not, there was a settlement and adjustment of all this controversy between the city and its officers and this plaintiff company, setting out that there was still another ordinance passed than the one mentioned in the petition, to wit, an ordinance just prior to the one in June, which required the paving of the tracks themselves and the "devil strip," but there had been an ordinance passed just prior to that some time,—April 21, 1890,—by which the city required it to pave not only its tracks and the "devil strip," but a foot outside of its tracks, making a space of sixteen feet instead of fourteen feet as was finally compromised and agreed upon; and that that being the condition of things, a law having been passed on April 21, 1890, by the legislature of this state, authorizing them so to tax in reference to these pavements all railroad companies in the city, in pursuance of that authority, they passed that ordinance, and, having thus passed it, that the railroad companies of the city protested. That ordinance was passed not only in reference to this road, but an

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ordinance was passed in reference to certain other roads in the city, requiring them to pave sixteen feet; that by a compromise between the owners of the adjacent property and the city authorities and this railroad company, this whole subject was discussed before the judiciary committee and the committee on taxation, and it was agreed that the city should recede from its demand that they should pave sixteen feet, and might pass an ordinance with their assent requiring them to pave fourteen feet. The other railroad companies have carried that out in good faith, but this railroad company refuses to carry out this agreement

It further avers in its answer that this railroad company never had an ordinance passed giving this company the right to lay its track from Wilson avenue to East Madison avenue; that there was no ordinance upon the subject at all, and they possessed no right, therefore, to cavil about terms, for they have not any grant at all over that road.

There is a general denial of all these allegations by way of reply on the part of the plaintiff.

Then, first, as to this failure of a grant, I am inclined to think that there has been a recognition by the city of the right to lay down its tracks and to use them from Wilson avenue to East Madison avenue. Some years ago this road was macadamized. This company then occupied that territory by its rails. It then paved, or bore its portion of the expense of paving and macadamizing that street and perhaps, to the full extent of covering the track and this "devil strip." That was under a prior ordinance. It was, therefore, a recognition by the city. The city again recognized it when it passed the ordinance in 1889 by which it repaved this street, requiring it to bear an expense, and it has recognized it all the way through by every one of these ordinances, and, in the provisions of the renewal ordinance, I find there was a reference to this very territory, for they undertook to describe where this railroad is to run, and they get it onto Woodland avenue, and "thence through said avenue to Madison avenue, subject to the following conditions and limitations." So that, it is contained in the renewal ordinance of 1879, and authority is granted there to run over that territory, so that, I apprehend, there is no serious difficulty in that part of the case.

But, coming to the provisions of the contract itself, it is said that, by this renewal ordinance of 1879, it was made subject to the future legislation of the city.

And again, in Sec. 8 of this renewal ordinance, all rights vested in the city council, the trustees of waterworks and gas company in respect to the care and improvement of the streets are expressly reserved, and are in no wise to be interfered with or curtailed by this grant.

Again, in Sec. 14:

"That, in case of failure by neglect or otherwise on the part of

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said Kinsman Street Railroad Company, its successors or assigns, to perform all and singular the conditions of this ordinance, together with all and singular the general ordinance and the future ordinances of the city in relation to said road, the privileges hereby granted and renewed shall become void and of no effect, and shall cease upon the adoption of a resolution of council to that effect."

That seems to be a provision in reference to the enforcement of the ordinance. That, in case of neglect or otherwise on the part of this company, its successors or assigns, to perform all and singular the conditions of this ordinance, then what may be done. It is not exactly an enacting clause, expressly reserving in so many words, but by fair implication, perhaps, it is assumed that it refers to the former ordinance and makes that a part of it.

By the old ordinance, the general railroad ordinance, in force at that time, Sec. 1, provides:

(The court here read Secs. 1, 4, 13 and 14 of said ordinance.)

Now, if it be true, that this renewal ordinance places them under the guidance and direction of the general ordinance of the city, the language of that old railroad ordinance is certainly broad enough to imply and to carry with it authority for the city to do all they seem to have done or required in this case.

Upon the subject of contract relations, there can scarcely be a doubt that, when an express contract is made between the city and a railroad company, in reference to its streets, and that contract is accepted by the railroad company for a definite period of time, that makes a contract that is inviolable, and must be recognized, and cannot be done away with simply by the action of the city, unless they have expressly reserved to themselves rights so to do.

This work of Elliott, Roads & Streets 564, holds this language: "It is the prevailing opinion that an ordinance is an irrevocable contract when it is accepted by the company."

Again, on page 565:

"What the legislature grants to the street railway company cannot, however, be taken away or abridged by the municipality."

That is undoubtedly true, as a general proposition of law.

"That the contract obligations between the city and parties occupying the streets are the same that they are between any other parties, and yet, there are certain rights which the city may legally and properly reserve to itself, and, perhaps certain things which they cannot reserve, to wit, the governmental care and control, which is placed in the hands of the city as a representative of the state to alienate or give away."

That is undoubtedly true.

This doctrine of contract relation has been recognized, as has been

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said, in 29 Ohio St., but there was an express provision in the ordinance itself that there should be a contract relation existing between them and their rights should be contract rights, yet the general proposition cannot be denied, I think, that the obligations of the contract must be regarded.

Now, the question is, What was this contract?

It is perfectly manifest and clear that, by this renewal ordinance of 1879, this company was required to pave the tracks between its rails. Some argument has been made by the city in this case, from the language used, that it might reasonably be supposed that between the tracks meant everything occupied by the company, inasmuch, for instance, as the rails are laid upon ties and these ties extend outside of the rails, that that is a part of its track, and that a fair interpretation of it covers the whole ground which they use, but I think a careful perusal of the language of this ordinance,—“its tracks between its rails,” must exclude anything outside of them. The city certainly so interpreted it in making its assessment, and that, it seems to me, must be a fair interpretation of it.

Now, when this original assessment, or this original ordinance was passed, both the renewal ordinance and the ordinance assessing for this other pavement, the track between its rails, the general law of this state, as passed by the legislature, recorded in Rev. Stat. 2504 (Lan. 3769; B. 1536-187), provided that the city of Cleveland, or cities generally, might require a street railroad to pave its tracks between its rails, and that is all that it provided for. That was the language of the act, and, in pursuance of that act, as it then stood upon the statute book, this renewal ordinance was passed, following the language of the statute. In pursuance of it, this assessment ordinance in 1889, was also passed, assessing the company for the pavement between the rails of its track, and it was thought necessary to go to the legislature before anything else could be done, and get an act passed by which cities were empowered, or this city, being a city of the second grade of the first class, only was empowered, to charge railroads with, and make them pay for, sixteen feet of this space; that the railroad and the city could agree in pursuance of this general act when it was passed. The old general railroad ordinance here that I have read, passed prior to the renewal of this ordinance, and under which it is claimed that they are now operating, or that this road is now operating by the terms of the renewal ordinance, provided something over and beyond that which the statute at the time permitted to be done, to wit, sixteen feet. There is no doubt about that, and yet, if a railroad company should agree with the city to adopt that, that being a subject of contract, there is no question about the obligation to perform just that thing, but, in the absence of any agreement upon the subject, I am apprehensive that the city authorities would

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have the right to compel it to pave just what the law permitted them so compel them to pave, but that the act itself, the ordinance, went yond the limitation of the law, I have no doubt, at that time, and y it is as I say, if they have come in and said that it would be the subject of contract relation, they must abide by it.

Now, getting back to the contract itself, with this state of the la they did contract when they renewed this ordinance to pave the tra between the rails and that only. This contract was to be in existen for twenty-five years, and I am inclined to think that that is all th did contract for, and that it had granted a contract obligation, notwithstanding the language of the general ordinance, that future legislati might be had in reference to this road. That future legislation cou be had and was had and proper to be had, there can be no controvers in reference to all governmental matters, all police regulations and a sanitary matters, all matters as to how many cars they should run an as to what fare they should charge; all these things were subjects th the city might properly legislate upon. When we find an express agrement as to how much of this track shall be paved, then, notwithstanding the general ordinance, the old one, provided for a greater space, it seen to me that that must control in the case.

Take this very Sec. 14, and it provides that, in case of failure, b neglect or otherwise, on the part of said Kinsman Street Railroad Company, its successors or assigns, to perform all and singular the cond tions of this ordinance, together with all and singular the general ord nance and the future ordinances of the city in relation to said roa the privileges hereby granted shall become null and void on the passag by the council of a resolution to that effect.

It is perfectly patent that it was not designed that they shoul comply with both of those ordinances, one requiring sixteen feet an the other requiring the space between the tracks, ten feet, more or les and it was not intended that there should be a forfeiture if they di not comply with both, two inconsistent things. When they special legislate as to how much they may or shall be required to pave, th language being "whenever it shall be deemed necessary to repave, then they shall be required to pave so much, it seems to the court tha that is conclusive upon the city, and that that general provision doe not apply to a case of that kind. As I have already indicated, it was provision beyond what the law would permit them to make, in the at sence of an agreement at the time, and, it seems to me entirely conclu sive that when it refers to the future legislation, the future ordinance of the city, it is in reference to all those legislative matters such as gov ernmental matters, police and sanitary regulations, regulations as t fare, etc., and all those things necessary to come within the scope of thi

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future legislation that is referred to, and there can be but one conclusion to be arrived at, taking the whole body of these two things together, and this, that they did agree that that extent and that only should be paved by this railroad company for the space of twenty-five years. It may or it may not have been a good contract. That is a matter with which the courts have nothing to do. Such it seems to the court they have done; have made such an agreement in view of all these facts.

I have been referred here to numerous ordinances, dealing not only with this Kinsman street railroad, but with the West Side street railroad, under which certain extensions were granted and certain conditions imposed, and that they should manage these extensions in pursuance of these ordinances. I do not see that they affect the general rights of the company under this ordinance.

In reference to the proposition that the street railroad company cannot be interfered with and stopped by the city authorities in this summary manner, I do not believe that objection is well taken. If I could have found that this ordinance was subject to the general ordinance, and subject to the power of the city to legislate at any time when it saw fit, then I think that the reservation of this Sec. 14 and the provision therein made that they could, on the passage of a resolution, forfeit this license and this right of the company, it would be perfectly legitimate for the city to do exactly what it did do, for they were right about it, notwithstanding the proposition that has been urged here that there is something in the passage of this act after the ordinance had been passed for the assessment; that it was then a pending proceeding, and that a legislative act or expression repealing it, etc., would be informal and invalid, and could not affect it. I do not think they were necessarily a party to that proceeding, and with this reservation expressly contained in the charter that they might do this thing, that that provided just exactly what the city could do.

There is only one remaining subject, and that is one upon which the court has had more doubt than any other, and that is upon the subject of this adjustment and settlement.

If this railroad company made a stipulation that it would pave fourteen feet, and another ordinance, 1169, passed some time in April, was amended and changed into the ordinance known as 1202, by which, instead of sixteen feet, it was required to pave fourteen feet, and it stood by, consenting to that, waiting, perhaps, until the city had refunded a portion of this fund that had been collected of the property owners, it would stand in no position to come into a court of equity now and say, though that occurred, that it was not legal, and therefore would not fulfill it. If I should find that state of things to exist, I should dismiss this petition at once.

How stands the proof in reference to that? It is said that these

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two committees of the council were in consultation, in joint session, and that Mr. Mulhern, the superintendent of this railroad company came over; that the council of the railroad was also present; that they were objecting to the legality of this ordinance, which undertook to require the company to pave sixteen feet; that the property owners were also there. They, of course, were interested in it, and they were contending for the existence of the ordinance as it then stood, requiring sixteen feet; that it was then said that, if fourteen feet was the measure that they should pave, there would be no objection to that, and they would proceed and do it. Now, that was so represented, it is claimed, to this committee, and that the committee, in pursuance of that arrangement, reported an ordinance recommending fourteen feet to be paved; that the city solicitor, it is said, in pursuance of such an understanding, reported in favor of making the space fourteen instead of sixteen feet, thus amending the ordinance, and stated in his recommendation to the council, officially, that it had been agreed upon between all the parties, and that the council, proceeding on that supposition, had acted, and passed this amended ordinance, requiring fourteen instead of sixteen feet of paving. In proof of that, we have the affidavits of some six or seven parties, property owners, the chairman of this joint meeting, Mr. Davidson, and an assistant city solicitor, who was present, making such a statement that such an understanding was come to; that Mr. Mulhern so represented, and that these recommendations were made upon the strength of that statement, in connection with the same thing being gone over with the other roads.

On the other side, it is said by Mr. Mulhern, that he made no such statement; that the most he did say, was, he was there and counsel for the road was there, protesting against it, and insisting that they were not bound to pave but ten feet instead of sixteen; that he continually protested about it; that after the committee had gone into secret session and came out, he immediately went to one of the committee and asked what had been done. This one of the committee to whom he was thus talking responded that they had agreed upon a compromise of fourteen feet. Mr. Mulhern then immediately said to him that the road would contest that, in his opinion. We have the affidavit of that member of the committee, who says that that took place. Mr. Mulhern did so state to him. The most that Mr. Mulhern says he did do about it was, that when this matter was upon its passage in the council, somebody asked him if he was going to contest it, and he said "No," believing, as he supposed, that, it having been thus recommended and talked over, they would pass it anyhow, but it was always the intention of his road, so far as he knew, to contest the legality.

We have the affidavit of Mr. Mulhern also upon the subject that he had no authority to make such a compromise; had been instructed ex-

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actly the reverse all the time. We have the affidavit of Mr. Hanna, the president of the road, Mr. Emery, the vice president of the road, Mr. Hanna, the secretary of the road, and all of them say that Mr. Mulhern's duties do not lie in that direction at all; he had no authority whatever about it, and that they had instructed their counsel at all times to contest the validity of this matter to make them pave more than the original ordinance required, to wit, ten feet. We have also the affidavit of two of the judiciary committee. They say there was no understanding, so far as they know; heard no such thing; no such agreement was made so far as it came to their knowledge. We have two of the tax committee, who were in joint session at the same time, who also testify to the same thing.

While it is entirely unsatisfactory to test questions of fact upon affidavits, without having the witnesses before you and subjected to a cross-examination, I have come to the conclusion that I cannot find, in view of all the facts in this case, that there was a definite understanding and an authorized understanding made by which they consented to this compromise and arrangement. It may be, that they have done so. When the witnesses are gotten into this court, when the facts can be developed as they really are, then perhaps we can find out what the real fact is; but it is a question for the city to establish that the burden is upon it to prove that this settlement and this adjustment was made. I am unable to say that that has been so established by the evidence.

It is said here that this railroad company took out a permit to do this work under this ordinance, and that it did clear up a space substantially covering not only the fourteen feet, but the sixteen feet. They were required to move the tracks and confess to that themselves; that they went down to the city civil engineer for a permit, and, when they asked for it, he issued one, saying they should pave the "devil strip" as well as between the rails. Of course, that was wholly unnecessary. If he had simply said, and perhaps all that he could say about it was to give them a permit to pave in accordance with the ordinances, just what they required, he could not interpose anything in it that was not in the ordinances themselves. Well, upon that being placed in it, they objected and would not take the permit, whereupon the civil engineer struck out the words "devil strip," and they took it in that shape, and went on to do this work. They were required to move these tracks in advance of the paving. The only bearing that that can possibly have had upon the rights of the city, whether he did or did not strike out is to throw light upon the contention here as to whether there was a settlement or not, showing that at that date they were contesting, and that all the time they were contesting, the right of the city to require them to pave more than the ten feet. All he was required to do was to give them a permit to put it down under the ordinance, what-

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ever the ordinance required, and it certainly did not affect the rights of the city, one way or the other.

It is said further that they dug out a large space from between the tracks. It is, at any rate, described as all dug up, and that they did this in pursuance of this arrangement to lay down this track; that shows the fact that they so understood it. We have not had very much testimony as to the condition of that. We have had some statements, pro and con, that the waterworks commissioners did it, laying down a pipe, and, on the other hand, that they did not have anything to do with it; that they laid it down outside of the "devil strip" entirely. We have not had any evidence on that subject that the court can take action upon. But, it is contended, at least, that they disturbed the "devil strip" and they say that they did not think it necessary to put that in repair again because the paving contractor was following them up; therefore there is no requirement for us to put it back. If it was a question as to whether he had torn up the street, and were obliged to put that back again in the condition in which we found it, we would undoubtedly do it, but that is not the question here; the question is, whether we are required to pave this strip.

Now, in view of these facts—I have gone over it at much greater length than I had anticipated I should do when I started to give my views on this matter, but it seems to have been necessary to go over a good deal of ground here—I have finally come to the conclusion that a temporary injunction must be granted in this case, and such will be the entry.

GUARDIAN AND WARD—INFANTS—PARTITION.

[Hamilton Common Pleas, May 29, 1907.]

ANNA MURR, AN INFANT, v. WM. C. MURR ET AL.

DUTY OF GUARDIAN AD LITEM IN PARTITION SUIT.

It is the duty of a guardian *ad litem* in a partition suit to investigate the appraisement of the property, before one of the partitioners will be permitted to buy it in at the appraised value; and when such a guardian, a son of partitioners' attorney and appointed at his suggestion, so neglects to look after the interests of his ward, and the property is bought by one of the partitioners at its appraised value and it is soon afterwards sold at a greatly increased price, and the proceeds are distributed among the adult partitioners ignoring the infants, the partitioners will be held accountable to the minors for their interests, as such transactions will be held to be, at least, constructively fraudulent.

[For other cases in point, see 5 Cyc. Dig., "Infants," §§ 231-238.—Ed.]

Jost Murr died intestate in 1900, leaving Caroline Murr, his widow, and five adult children. The estate consisted of two pieces of realty with only one of which we are concerned in this case.

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In 1901, Louis J. Murr, one of the sons, died intestate, leaving a widow, Anna L. Murr, and three children.

Caroline Murr, as the administratrix of Jost Murr, brought a suit in the Hamilton county probate court in July, 1902, to sell the real estate to pay debts but such suit was dismissed by her on October 3, 1902, and one of the sons of Jost Murr through the same attorney who represented the administratrix on the same day, to wit, October 3, 1902, brought a suit in partition in the common pleas court of Hamilton county asking for a partition of all the real estate of which Jost Murr died seized. The surviving adult children of Jost Murr all entered their appearance in said partition case and filed answers joining in the prayer of the petition. They were represented by the same counsel who represented the plaintiff and had represented the administratrix.

Anna L. Murr, the widow of Louis J. Murr, son of Jost Murr, and the three minor children of Louis J. Murr were duly served, but were not represented by any counsel of record, until at the suggestion of the attorney for the plaintiff in the partition proceeding, the son of such attorney was appointed guardian *ad litem* for said minors. Such guardian filed the usual answer.

When the case was ripe for a partition decree the attorney for the plaintiff, who also represented all the adult children of Jost Murr, suggested the names of the commissioners in partition, and the decree of partition was duly entered.

The property in question was appraised at \$3,023.78, subject to a charge of \$100 per year as the estimated value of the dower of the widow of the intestate. It is located at the northeast corner of Shillito street and the C. L. & N. railway.

Jost Murr shortly before his death had given an option on the property at \$10,000, but the prospective purchaser having died shortly after receiving such option, the option passed.

In addition to the value which the property possessed as then used, it had a value as railroad property or as property valuable for a manufacturing plant by reason of its location. The widow and the adult children of Jost Murr had knowledge that such property had always been held by their father at a value of about \$10,000..

After the commissioners in partition made their report, one of the adult children of Jost Murr elected to take the property at the appraised value and such property was confirmed to him in accordance with said election and a deed duly executed by the sheriff.

The widow and adult children of Jost Murr receipted for their share of the proceeds at the sheriff's office without receiving any money, and the only money that was paid in by the heir electing to take was the costs, the dower interest of Anna L. Murr, widow of Louis J. Murr,

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and an amount representing the interest of the estate of Louis J. Murr, which amount was ordered paid to his administrator.

In July, 1903, after the decree of distribution in the partition case, two of the minor children of Louis J. Murr, deceased, were killed, leaving only one surviving, to wit, Anna Murr, the plaintiff in this case.

The guardian *ad litem* of the minors in the partition proceeding did nothing whatever in the partition proceedings, except to file a formal answer.

About five months after the decree of confirmation, an option was given by the adult heir who had taken the property for the sum of \$8,000. The party taking such option, representing the railroad company, promptly accepted the proposition and soon thereafter a deed was duly executed conveying the property for the consideration of \$8,000.

The widow of Jost Murr and his adult children, of whom the party electing to take the property in the partition proceeding was one, thought and without regard to the fact that one of such adult children was the sole owner of the property subject to the dower interest of the mother, the \$8,000 was divided by giving Caroline Murr, the widow of Jost Murr, \$2,000, she having released her dower interest when the sale was made to the representatives of the railroad company, and to each of the four surviving adult children of Jost Murr the sum of \$1,500. The widow and surviving minor child of Louis J. Murr were ignored.

J. T. Harrison, for plaintiff.

J. J. Gasser and Spangenberg & Spangenberg, for defendant.

HUNT, J.

The appointment of a guardian *ad litem* in a partition proceeding is not a mere form. It is the duty of a guardian *ad litem* to bring the rights of his ward under the consideration of the court for decision. *Long v. Mulford*, 17 Ohio St. 485 [93 Am. Dec. 638].

The duty of a guardian includes an investigation by him of the value of the property before one of the parties to such a proceeding is permitted to take the property at the appraised value.

In the partition proceeding now under examination the plaintiff's attorney was the only active attorney in the case. He represented all the parties to such proceeding capable of selecting an attorney except the widow of Louis J. Murr, who never filed any answer. He suggested the guardian *ad litem* and the commissioners in partition. He was the only attorney of record, and exclusively conducted the proceedings from beginning to the end. The guardian *ad litem* was a son of such attorney and did nothing whatever in the interest of his ward, except filing the formal answer required by the statute. The adult coparceners, parties in such proceeding, knew the character of the property and that among themselves as family knowledge, it was considered to be worth consid

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erable more than the appraisement. Within a few months after the property was taken by one of them at the appraised value, it was sold by the party taking it at more than double the appraised value and the consideration so obtained was divided among them as if the property had been owned by all the adult coparceners. Such adult parties and coparceners must necessarily be charged with knowledge of what their attorney did even though done in good faith, and of the absolute failure of the guardian to bring the interests of his wards to the proper consideration of the court, and must be charged with being instrumental in causing such action or rather want of action by such guardian *ad litem*.

Although there was no actual conspiracy among the adult parties in the partition proceeding to defraud the minor, such partition proceeding is at least constructively fraudulent as to such minor, and such adult parties to the extent that they have severally profited by such partition proceeding are accountable to such minor to the extent of the minor's interest in said property.

CRIMINAL LAW—INTOXICATING LIQUORS.

[Franklin Common Pleas, July 29, 1901.]

W. F. VOLK v. WESTERVILLE (VIL.).

1. MAYOR OVERRULING MOTION FOR CHANGE OF VENUE PROPER WHERE NO OTHER PERSON WAS AUTHORIZED TO TRY CASE.

In a prosecution for unlawfully keeping a place where intoxicating liquors are sold at retail, it is not error for a mayor before whom the case is brought to overrule a motion for change of venue, made on the ground that he is a material witness in the case, where it does not affirmatively appear from the record that there was any authorized officer or person to whom the case could have been legally sent for trial.

2. AFFIDAVIT NOT BAD FOR DUPLICITY.

An affidavit is not bad for duplicity in such a case, because it charges several distinct offenses of the same kind requiring punishments of like nature; and the discretion of the trial court in overruling a motion to require the prosecution to elect upon which count it will proceed will not be interfered with, unless it appears that it was exercised to the manifest injury of the defendant.

3. SINGLE SALE SUFFICIENT TO ESTABLISH CHARGE OF KEEPING PLACE.

Proof of a single sale is sufficient to establish the charge that the defendant did unlawfully keep a place where intoxicating liquors were sold.

4. EVIDENCE RULED ON CROSS-EXAMINATION BROUGHT OUT BY OTHER WITNESSES SAVES FROM ERROR.

The *per diem* which the prosecution has agreed to pay its witnesses, in addition to the fees which they will receive under the statutes, is a proper subject of cross-examination; but where the fact of an agreement to pay a *per diem* and the amount thereof is subsequently disclosed by the testimony of other witnesses, it is not likely that injustice resulted from the sustaining of an objection to that line of examination, and a reversal of the judgment will not be granted on that ground.

Volk v. Westerville.

ERROR to mayor's court of Westerville.

G. H. Stewart, for plaintiff in error.

G. L. Stoughton, for defendant in error.

EVANS, J.

On November 28, 1900, the plaintiff in error, Volk, was found guilty in the mayor's court of Westerville of unlawfully keeping a place where intoxicating liquors were unlawfully sold at retail, as charged in the first, second and third counts of the affidavit filed in said mayor's court; and on December 6, 1900, said mayor's court by reason of said convictions, for each of said three separate and distinct offenses sentenced said Volk to pay a fine of \$150 and costs of prosecution, making in all \$450 and costs.

The case is here on error and this court is asked to reverse the said judgment and sentence for various reasons assigned in the petition in error. Such of these alleged errors as appear to be relied upon chiefly will be briefly alluded to in this opinion.

November 23, 1900, Volk filed a motion for a change of the place of trial of the case for the reason that the mayor was a material witness for him and that without his testimony he could not safely go to trial. This motion the mayor overruled, and Volk excepted. It is now insisted that in such ruling the mayor erred. Volk's counsel relied on Rev. Stat. 6529 (Lan. 10106), as authority for making such motion, but that section, I think, is not applicable, and if it is not applicable to a prosecution before the mayor for a violation of a village ordinance, it seems that there is no legislation authorizing the mayor to entertain such motion.

Revised Statute 1744 (Lan. 3256; B. 1536-773), provides that the mayor, within the corporate limits, "shall have all the jurisdiction and powers of a justice of the peace in all civil cases." "He shall have jurisdiction in criminal cases as hereinafter provided." My attention has not been called by the learned and diligent counsel in this case to any legislation, nor have I found any in the municipal code, or elsewhere in the statutes of Ohio, whereby said Rev. Stat. 6529 (Lan. 10106) is made applicable to prosecution before mayors for the violation of ordinances. My attention is called to the latter part of Rev. Stat. 1837 (Lan. 3371; B. 1536-773a), which provides that:

"In cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor."

But this provision is by its terms restricted to cities having no police judge. It is probable that this provision was not extended to villages because of the provisions in Sec. 1831 Rev. Stat. (repealed 96 O. L. 96). This section authorizes the council in villages, upon the

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mayor's recommendation, to appoint a police justice who shall have "concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation or city, with full power to hear and determine the same."

The record is silent as to whether there is any such officer as "police justice" in the village of Westerville, and hence I must consider the case as if there were none. As it does not affirmatively appear from the record that there was any authorized officer or person to whom said cause could have been legally sent for trial by said mayor, this court cannot conclude that he erred in overruling said motion.

2. The defendant filed a motion to quash the affidavit filed before said mayor, November 12, 1900, for the reason that the affidavit is bad for duplicity, and upon its face charges three separate and distinct, independent and disconnected offenses against the ordinance referred to in said affidavit. This motion was argued, submitted and overruled, and Volk excepted. Volk also filed a motion to require the village to elect upon which of said charges it would proceed to trial; the mayor overruled said motion, and Volk excepted.

In prosecutions for misdemeanors several distinct offenses of the same kind, requiring punishments of like nature, may be joined in separate counts of the same pleading. 10 Enc. Pl. & Pr. 549. The trial court may in its discretion sustain a motion to require the prosecution to elect upon which count it will proceed, or the court may overrule such motion, in the exercise of its discretion, and its action thereon, as a general rule, will not be interfered with, unless the discretion has been to the manifest injury of the defendant. 10 Ency. Pl. & Pr. 551; *State v. Bailey*, 50 Ohio St. 636, 640 [36 N. E. Rep. 233].

In *Bailey v. State*, 4 Ohio St. 440, it is held, "Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court trying the cause may require the prosecutor to elect upon which count he will proceed; but the action of the court in this respect, being a matter of discretion, can furnish no ground for a writ of error," unless there be an abuse of discretion. *State v. Bailey, supra*; see *Eldredge v. State*, 37 Ohio St. 191.

It is not manifest from the record that in the overruling of said motion Volk was embarrassed or injured in making his defense.

3. It is also insisted that evidence did not show that the said Volk did unlawfully keep a place where intoxicating liquors were sold at retail, and also, that if the evidence did not show that he did, that he could not, under the charges in the affidavit, be found guilty of more than a single offense.

Volk v. Westerville (Vil.), an unreported case decided by the circuit court of this county about a year ago, is an authoritative decision which this court should follow. In that case it appears from the written

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opinion of the court delivered by Sullivan, J., that the court held proof of a single sale was sufficient without proving a series of sales constitute the offense charged, that the defendant did unlawfully at a place where intoxicating liquors were sold at retail; that the case *Miller v. State*, 3 Ohio St. 475, 477, has no application as an authority to the case at bar. With this decision to guide me, I cannot say that the record before me shows that the finding and judgment of the mayor's court is contrary to the law or the evidence.

4. Nor can this court say, in the light of *Alliance v. Joyce*, 49 O. St. 7 [30 N. E. Rep. 270], that the ordinance under which the prosecution was had is void because providing for an excessive fine.

5. The remaining question to be mentioned in this opinion relates to the rulings of the mayor as to the admission and rejection of testimony. The question here is whether such rulings of the mayor are erroneous to such an extent as that his judgment should be reversed. The question, as I understand it, is the most serious question appearing upon the record. Some of the questions put to the witnesses for the prosecution on cross-examination as to how much money they had received were to receive for their services and testimony in the case, were objected to by counsel for the prosecution and the objections were sustained by the mayor. Such questions, or at least, some of them, the mayor should have required the witnesses to answer. Thus, for example, at page 72 of the bill of exceptions, these questions were put to the defendant's (Volk) counsel on cross-examination of W. A. Allaman:

"Q. Do you draw your pay from this league for coming here day?

"A. Yes, sir.

"Q. Regular *per diem*?

"A. Yes, sir.

"Q. How much?

"(Question objected to by plaintiff as immaterial; objection sustained; exception by defendant.)"

The credibility of a material witness is always in issue and his interest, if any, in the result of the case or in the prosecution may be shown by cross-examination. Hence, it seems, some of the witnesses like Mr. Allaman were to be paid a *per diem* for attending the trial in addition to the fees allowed them by the statutes as witnesses. The amount of such *per diem* was a proper subject of cross-examination, and should, when proved, be considered by the trial court as a proper circumstance touching the witnesses' credibility. Such a circumstance might be entitled to but little, if any weight, or it might seriously affect the witnesses' credibility. The question here is not as to what weight the circumstances, if proven, would have had, but the question goes to the right of the defendant to investigate and show to the court, if

could, that the witnesses were not credible but were influenced by some undue or improper motive or consideration. Proof, however, of what *per diem*, or pay, the several witnesses were to have, appears from the testimony of other witnesses in the case, and for this reason it is probable that no injustice was done. Rev. L. F. Johns testified that Mr. Allaman by agreement was to be paid a *per diem* and his expenses; that he was to have three dollars a day; that he had been paid in all about thirty-five dollars; that Alaman could employ other persons (bill of exceptions, pages, 90, 91); the others, it appears from the testimony of other witnesses, received the same *per diem* and expenses as Allaman.

The conclusion reached is, that the petition in error should be and is dismissed at the costs of the plaintiff in error.

EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—SUBROGATION.

[Hamilton Common Pleas, May, 1907.]

FRANK EICHER, ADMR., v. THOMAS H. DARBY, ADMR. DE BONIS NON.

1. SUBROGATION TO ADMINISTRATOR TO RIGHTS OF CREDITOR, WHEN.

The payment by an administrator of claims against the estate from his own funds is not such a payment as precludes the filing of a requisition for the disallowance of such claims; and while in the event of disallowance the administrator becomes subrogated to the rights of the creditors so paid, he acquires no greater rights than the original creditors would have had as the holders of claims which had been allowed.

[For other cases in point, see 7 Cyc. Dig., "Subrogation," §§ 30, 31.—Ed.]

2. LIMITATION OF CLAIMS AGAINST AN ESTATE.

No suit by holders of claims which have been allowed is necessary to preserve their right to participate in the assets of the estate, and Rev. Stat. 6113 (Lan. 9652) is therefore not applicable to a claim which has been allowed until it has been reconsidered and disallowed.

[For other cases in point, see 4 Cyc. Dig., "Executors and Administrators," §§ 1374-1396.—Ed.]

3. LIMITATION OF ACTION ON DISALLOWED CLAIM.

Where claims against the estate of a decedent were allowed in due course by the administrator, but were subsequently disallowed by the administrator *de bonis non*, a suit for the allowance of such claims can be maintained if brought under Rev. Stat. 6098 (Lan. 9637) within six months after their rejection.

[For other cases in point, see 4 Cyc. Dig., "Executors and Administrators," §§ 1397, 1398.—Ed.]

[Syllabus approved by the court.]

Closs & Luebert, for plaintiff.

J. J. Gasser, for defendant.

HUNT, J.

The facts in this case are as follows:

Martin Glenn died April 14, 1898. His estate consisted of a saloon and grocery conducted in a building owned by himself. By his will

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the estate, real and personal, was left to his wife for her life or widowhood. The will was probated May 17, 1898, and the widow, Bridget Glenn, was appointed executrix. There were two minor children. On June 17, 1898, an inventory of the estate was duly made. The inventory showed grocery and saloon fixtures appraised at \$492.98, accounts due the estate \$297.52, also household furniture. The household furniture, grocery and saloon fixtures and \$500 in cash were set off to the widow and the minor children for their first year's support. The inventory was filed on July 13, 1898.

Martin S. Glenn had his life insured in the sum of \$2,000, payable to Bridget, his wife, and upon his death the money was duly paid to his wife. In addition to the expenses of administration, funeral expenses and widow's allowance, the estate of Martin Glenn was liable in the sum of about \$1,143.62 for business debts and taxes. All these claims except her own first year's allowance Bridget Glenn paid from the \$2,000 insurance. On January 30, 1900, Bridget Glenn filed an account as executrix of her husband's estate, but such account showed no receipts by her, although she had collected on account of the accounts inventoried \$166.72. The accounts showed disbursements for the funeral expenses and sundry administrative expenses amounting in all to \$264.15. There was no mention made in said account of the other claims which had been paid by her from her own funds. The account was confirmed on February 28, 1900.

On January 14, 1901, Bridget Glenn died, and on January 26, 1901, Frank Eicher was appointed as her administrator and gave due notice of his appointment. Bridget had continued the grocery and saloon business, and when she died she left about the same amount of business debts as her husband had left when he died, and her estate was insufficient to pay the claims against it by about the amount of these business debts. Her creditors then endeavored, through her administrator, to charge her deceased husband, Martin's estate, with the claims which Bridget had paid from her own money and with the unpaid \$500 allowed for her first year's support.

On April 23, 1902, Thomas Darby was appointed administrator *de bonis non* with the will annexed of the estate of Martin Glenn, and gave notice of his appointment in October, 1902. Eicher, as administrator of Bridget Glenn, presented to Thomas Darby, administrator *de bonis non*, a claim for the debts of Martin Glenn paid by Bridget and for the \$500 allowed for first year's support. Such claim was allowed by Thomas Darby, and on April 1, 1903, he brought a suit in the probate court to sell the real estate of Martin Glenn to pay such claim. On behalf of the children of Martin Glenn a requisition was duly filed for the disallowance of the claim presented to Thomas Darby by Eicher, administrator, and on February 6, 1906, a bond for such

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disallowance having been duly filed, such claim was disallowed. On February 27, 1906, this suit, being a suit for the allowance of such claim, was brought. Although, as stated, a suit had been brought by Thomas Darby, administrator *de bonis non*, in the probate court to sell the real estate of Martin Glenn, such suit was not prosecuted to a judgment, because a suit in the meantime had been brought by the Cincinnati Interterminal Railway Company to appropriate the real estate for railroad purposes. This appropriation proceeding was duly prosecuted and the property taken for the sum of \$10,750, which amount was paid into court and has now been all distributed except the sum of \$2,250, which is held by Thomas Darby, administrator *de bonis non* of the estate of Martin Glenn, subject to such order of distribution as in a proper case may hereafter be made.

The record evidence introduced in this case shows that there has been a good deal of litigation pertaining to the issues in this case, in proceedings wherein such issues could not be conclusively determined, either because the court in such proceedings had no jurisdiction to determine the issue or because necessary parties were not before the court.

In *In re Estate of Bridget Glenn*, No. 50242, Hamilton county probate court, an attempt was made to have the issue in this case determined by filing exceptions to the inventory of the administrator so as to require him to include as assets the claims, the validity of which is here in issue. The probate court although having power to order the inclusion of such claims as assets in the inventory, had no jurisdiction in such proceeding to determine the validity of the claims, although all the parties now before the court seem to have taken part in the hearing of such exceptions. On appeal from the order of the probate court, the common pleas court had no greater jurisdiction than the probate court. The order of the probate court ordering the inclusion in the inventory of the claim or claims now at issue, the appeal to the common pleas court, the error proceedings to the circuit court and the Supreme Court determine nothing so far as determining the validity of such claims, to wit, the issue in this case.

In the case of *Mary F. Glenn et al. v. Thomas H. Darby*, Admr. et al, No. 129906, Hamilton county common pleas, and in the appeal of said case to the circuit court the court could not determine the validity of the claim now at issue without the administrator of Bridget Glenn being a party, and the final decree in such cases does not undertake to determine the validity of the claims now at issue, nor if valid as a claim against the estate so far as affecting assets coming into the hands of the administrator, does not undertake to determine whether such claim would be valid as against the proceeds of the sale of real estate. The only effect of the judgment in *Glenn v. Darby*, Admr., was, that \$2,250 being part of proceeds of the sale of real estate was paid

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to Thomas Darby, as administrator, to be distributed as might thereafter be decreed in a proper proceeding.

The present action is an action brought by the plaintiff for the allowance of claims amounting to \$1,496.97 against the estate of Martin Glenn, deceased. The claim was presented to the defendant administrator and disallowed by him pursuant to a requisition and bond filed by the heirs and devisees of Martin Glenn, deceased. The claim consists of \$500 allowed to Bridget Glenn for her first year's allowance, \$1,407.77 for claims against her husband paid by her less \$298.47 paid to the plaintiff by the heirs of Martin Glenn. The claim of \$1,407.77 is made up of two amounts, to wit: \$264.15, shown by the account of Bridget Glenn, as executrix of her husband, to have been paid by her, and \$1,143.62, the amount of claims against her husband's estate which she paid, and which she did not include in her account. There is a further credit upon said claim to the extent of \$166.72 by reason of assets of the estate of Martin Glenn, collected by Bridget Glenn, and not accounted for by her. In so far as it is material as to which items of the claims sued upon such credit should be applied, the fact that the widow's allowance is a preferred claim would make such credit a credit upon the widow's allowance.

In this case neither the heirs, devisees or any third persons have been injured in any way by what was done or omitted to have been done by the widow as executrix of Martin Glenn. On the contrary the heirs and devisees were benefited by what she did. Nor did she do anything that can be considered as a waiver of her rights. The filing of partial account, which only partly shows what she had done, did not preclude her or her administrator after her death from filing a full account and claiming all that could be claimed thereby.

The liability of the estate of a decedent, whether such estate consists of realty or personalty, for his debts including the allowance made to the widow for her first year's support is purely statutory and must be worked out substantially in accordance with the statutory remedies given.

No presentation or allowance of the claim of the widow for her first year's support is necessary further than the fixing of such amount in the inventory by the appraisers. As so fixed, unless exceptions are filed thereto and sustained, it remains as a preferred claim against the estate. No further proceedings are necessary to preserve the validity of such claim.

The payment by the executrix of debts against the estate waives presentation of allowance and is an allowance. The payment by the executrix of such claims from her own funds is not such a payment of such claims as would preclude the filing of a requisition for the disallowance of such claims under Rev. Stat. 6098 (Lan. 9637), because at least

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until she has reimbursed herself from the assets of the estate, the claims are not paid by the estate. By such payment, however, from her own funds she was subrogated to the rights of creditors so paid, but she acquired no greater right than the original creditors would have had as the holders of allowed claims. No suit is necessary to preserve the right of holders of allowed claims to participate in the distribution of the assets which may come into the hands of the executrix. Revised Statute 6113 (Lan. 9652) is not applicable to an allowed claim until disallowance. *Stewart v. McLaughlin*, 47 Ohio St. 555 [28 N. E. Rep. 175].

The effect of a distribution by the executrix of the personal estate, without the payment of the widow's allowance and of allowed claims in the order of their priority, is not necessary to be considered in this case, as there was no such distribution. The only personal assets which came into her hands are presumed to have been applied to her allowance and are considered as a credit thereon. The right to have the real estate applied to the payment of such debts must be worked out through the executrix, and said right may be lost if the executrix should fail within the statutory period to make proper application therefor. Such statutory period may be six years (*Longley v. Stump*, 9 Dec. Re. 234; 11 Bull. 247); but the determining of the question is not necessary in this case, especially as a suit was brought by the administrator *de bonis non* within six years after the death of the decedent. The present action is a suit upon claims once allowed by the executrix as far as an allowance was necessary, and subsequently disallowed by the administrator *de bonis non* pursuant to a requisition therefor. No suit was necessary until after such disallowance. Revised Statutes 6113 and 6120 (Lan. 9652, 9659), in their operation, are subject not only to the exceptions contained in such sections, but also to such exceptions as must necessarily be implied, in order to give effect to other sections of the administration statutes. Among these other sections is Rev. Stat. 6098 (Lan. 9637). The present suit having been brought within the time limit of such section and the claims sued upon being such as should have been allowed, judgment must be given for the plaintiff.

Inasmuch as Bridget Glenn had the use of the property from which the claims should have been paid, no interest will be allowed except from the date of her death.

Coffelder v. Gas & Elec. Co.

DAMAGES—EVIDENCE—TRIAL.

[Hamilton Common Pleas, 1907.]

MARY COFFELDER V. CINCINNATI GAS & ELEC. CO.

1. NECESSITY OF SETTING FORTH IN DETAIL INJURIES COMPLAINED OF.

The purpose of requiring a plaintiff in an action for personal injuries to set forth in detail the injuries complained of, is not to furnish proof that no other injury was sustained; and where petitions for damages for the same injuries are filed in two different courts, it is not error for the court in which the case is tried to refuse to permit the petition filed in the other case to be offered in evidence, where the purpose of the defendant in offering it is merely to show that an injury as to which the plaintiff has offered testimony was not mentioned in either petition.

[For other cases in point, see 6 Cyc. Dig., "Pleadings," §§ 237-259.—Ed.]

2. ERROR OF SENDING PLEADINGS TO JURY ROOM.

The sending of the pleadings with the forms of verdict to the jury room is a common practice and it is not possible that either party has been prejudiced thereby where the pleadings had been read to the jury during the progress of the trial.

[For other cases in point, see 7 Cyc. Dig., "Trial," §§ 639-655.—Ed.]

3. GROUND FOR SETTING ASIDE VERDICT.

The theories of counsel as to what must have happened under the circumstances existing cannot be used as a basis for setting aside the finding of the jury as to what really did happen.

4. PURPOSE OF CHARGE TO JURY.

The purpose of the charge of the court to the jury is to instruct them as to what findings may be returned against either party to the action, and not to state the negative propositions as to what findings may not be returned.

5. REASONABLENESS OF VERDICT.

A verdict of \$1,500, as damages for injuries sustained by a seamstress who suffered a dislocated shoulder which has permanently disabled her from following her occupation and caused her much pain and suffering, is not excessive.

[For other cases in point, see 3 Cyc. Dig., "Damages," §§ 1076-1134.—Ed.]

MOTION for new trial.

Harmon, Colston, Goldsmith & Hoadly, C. M. Cist and Guido Gores, for plaintiff.

J. W. Warrington and Murray Seasongood, for defendant.

WOODMANSEE, J.

This action was brought for the recovery of damages because of the alleged negligence of the defendant company in digging and permitting to remain open a certain ditch or trench at nighttime and without light or warning to indicate the existence of the same.

The injuries complained of occurred during the nighttime on September 22, 1903. It is not disputed that the defendant company during the daytime of said date was rightfully engaged in the digging of a trench along Linden avenue in the village of Elmwood Place, this

county, about three feet from the north curb thereof, and at the same time dug a service ditch or trench from said larger trench about eighteen inches wide and two feet deep extending beyond the curb and to the sidewalk, which was about two feet beyond the curb.

It is claimed by the plaintiff that while walking along said sidewalk after nightfall in the exercise of ordinary care she stepped into said open trench and was seriously injured, for which the jury in this case awarded her damages in the sum of \$1,500.

The defendant admitted the digging of the trench, both along the thoroughfare and also the service trench, but claims that the latter trench was completely covered, and that a red light was placed on the earth near the same, so that it was impossible for a pedestrian walking along the sidewalk to step or fall into the same.

Counsel for the defendant also claims that if the plaintiff was injured it was not by falling into the service trench, but by carelessly and negligently attempting to cross the street between two streets where there was no regular crossing, and thus negligently fell into the larger trench which she could have avoided by the exercise of ordinary care.

In seeking to have the verdict set aside it is claimed, among other things, that the court erred in refusing to permit the defendant to offer in evidence a petition that had been filed by this plaintiff in a suit brought in the United States circuit court for the southern district of Ohio for the same alleged injuries.

It appeared that said petition was not signed by the plaintiff, but was sworn to by counsel for the plaintiff, who at the time of the hearing of this case was not present and is absent from the state. The court stated at the time that if said attorney had been present the petition would have been admitted in evidence for what it was worth, but under the circumstances the evidence tendered was excluded.

It is claimed by the defendant that the said petition was in the nature of an admission on the part of the plaintiff that her injuries were different from those complained of in this case, in that no reference was made to the dislocation of her shoulder. It was urged that because she did not allege in said petition that was verified by her attorney, that her shoulder was dislocated, therefore it must have been that it was not dislocated.

The allegation of injuries set out in the petition filed in the United States circuit court reads as follows:

" * * * was greatly hurt internally and sustained severe external injuries, her right leg, right arm and shoulder and right side of her body being bruised, strained and hurt; * * * that her left leg became permanently unsound and weak; that her right arm and shoulder became partially numb and useless, so that she became unable to pursue her vocation of dressmaker."

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The words used in the petition filed in this suit which describe injuries are as follows:

" * * * and her left leg and her right arm and shoulder and right side of her body were bruised, strained and hurt; * * * left leg became permanently unsound; her right arm and shoulder came partially numb and useless and will remain so permanently, that she is unable to pursue her vocation of dressmaker."

It will be observed that the language used in both of these petitions is practically the same, both as regards the injuries sustained as shown above and the description of the trench.

If it is to be said that because the petitions did not allege that the shoulder was dislocated, therefore it was not dislocated, then the petition filed in this case certainly binds the plaintiff and further admission of that sort would be of no advantage to the defendant. If the position taken by counsel for defendant is correct, then the practice requiring the plaintiff in damage suits to set out in detail the injuries complained of would work to the detriment of the defendant, because if the plaintiff for instance had lost an eye as a result of the injury and did not so state in his petition, it would be proof sufficient that an eye was not lost.

In this case the plaintiff testified that her shoulder was dislocated and a reputable physician testified that he reduced the dislocation, and to undertake to say that this positive testimony can be overcome by mere failure to say anything about a specific fact in a pleading would be an odd position to take in the matter.

But regardless of the probable effect of such petition if used as evidence, the court is of the opinion that it was not error to refuse to admit it.

It is also claimed by counsel for the defendant that the court erred in sending the petition and answer with the jury into the jury room.

It has been the almost universal practice in these courts to send the pleadings with the forms of verdict to the jury room, and in many cases it would seem almost necessary to do so. Inasmuch as the pleadings had been read to the jury, the court is of the opinion that neither party was prejudiced because of any consideration that the jurors may have given to the pleadings.

If it is true that defendant was prejudiced because the United States court petition with practically the same allegations was not admitted in evidence, then the taking of a like petition into the jury room ought to make amends for all such prejudice, while it would at the same time work an injury to the plaintiff of which the defendant could not complain.

To grant a new trial for this reason would be wholly without excuse.

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It is urged that a new trial should be granted because of improper conduct on the part of counsel for the plaintiff.

While some statements may have been made in the presence of the jury that were not without objection, yet the court begs to observe that in this case both parties to the suit were represented by the highest order of skill and ability and the court found great pleasure in trying the case from its beginning to the end and has no recollection of prejudicial conduct on the part of counsel.

Counsel for the defendant insists with a measure of confidence that the plaintiff must have stepped into the larger trench which was within the street and beyond the curb stone, and that she could not have done so in the exercise of ordinary care and was therefore guilty of contributory negligence.

But there is no evidence that she fell into the larger trench. She states positively that she fell into the service trench. Her sister was by her side and she confirms that statement, and the court instructed the jury that if they found that the plaintiff did not fall in the service trench she could not recover, and the jury was further instructed that if they found from the testimony that the defendant company had properly safeguarded said service trench by placing a cover over it and a light near to it, then the plaintiff could not recover.

The testimony in this case was conflicting, but the jury certainly found from the testimony that the trench was not covered; that the space surrounding it was not lighted; that the plaintiff did in the exercise of ordinary care fall into the same, and the court is not ready to say that the evidence does not warrant such a finding.

Coming now to the amount of damages which are claimed to be excessive. In this connection counsel for the defendant have insisted that the court erred in not positively instructing the jury that the plaintiff could not recover for medical attention.

During the progress of the trial the court stated in the presence of the jury that the plaintiff could not recover for anything expended for medical service, unless proper testimony was offered to show that the amount charged or paid was reasonable. The entire amount claimed in the petition for medical services was limited to \$50.

The instructions of the court to the jury did not have any reference to a recovery for medical attention, and we understand the purposes of instructions to be to advise the jury what findings may be made for or against either party, rather than what might not be found for or against the parties.

Is the verdict of \$1,500 excessive? The testimony of the plaintiff is, that her shoulder was dislocated; that it was her right shoulder; that she was right-handed and used her hand in her vocation as a seamstress; that she was compelled to give up her work; that subsequently

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she was married, but because of the condition of her shoulder she unable to perform many of the duties about her home; that for a period of time she suffered great pain because of such injury. It for the jury to determine what weight should be given to her testimony. The court is clearly of the opinion that unless the plaintiff far stated the suffering which she endured, the amount of recovery in case is not excessive and the verdict of the jury will not be disturbed. Motion overruled.

BENEFICIAL ASSOCIATIONS.

[Superior Court of Cincinnati, General Term, February, 7, 1907.]

Hosea, Murphy and Smith, JJ.

(Judges Murphy and Smith of the Hamilton common pleas, sitting in place of Judges Ferris and Hoffheimer.)

CATHOLIC UNION OF KNIGHTS OF ST. JOHN V. MARY HERRON.

RIGHTS OF BENEFICIARIES OF EXPELLED MEMBER OF MUTUAL BENEFIT ORDER.

The beneficiaries of an expelled member of a subordinate lodge of a mutual benefit association, whereof there is a superior body which prescribes the laws of the subordinate lodges, and among other things has provided a right of appeal to the superior body in a case of expulsion, cannot recover the prescribed benefits in case of the death of an expelled member, where the deceased did not exhaust his rights under the rules of the order, or make any effort to secure a reversal or modification of the decree of expulsion, or make any protest thereto.

[For other cases in point, see 1 Cyc. Dig., "Beneficial Associations," 79-131.—Ed.]

ERROR to special term.

O. J. Cosgrave, for plaintiff in error.

F. M. Gorman, for defendant in error.

MURPHY, J.

It appears in this case that one Martin Herron was a member of the Roman Catholic Union of the Knights of St. John. He fell in arrears of dues, violated some of his obligations as a member of the order; serious charges were made against him. These charges were written out and presented to him by James Clark, one of the trustees, and he was notified of the pendency of these charges. The order subsequently notified him and he was expelled therefrom, and not long thereafter died. During his lifetime he made no protest against this action of the order; he took no action, and took no appeal to the higher body from the order which expelled him, as the laws of the order provided he could do; nor did anyone in his behalf take such an appeal. After his death his widow brought this suit, to recover the amount of death benefits that she would have been entitled to had her husband continued to remain a member of the lodge up to the time of his death in good standing.

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Herron was a member of a subordinate lodge. There is a superior body, which prescribes the laws for subordinate lodges; and among such laws prescribed by the superior body is the right of appeal from the action of a subordinate lodge to his superior body, which, as has been stated, neither Herron nor anyone for him acted upon.

The defendant in error claims that the expulsion was illegal and not binding upon Herron, or his beneficiaries after his death.

The plaintiff in error contends that the action of the lodge in expelling Herron is binding upon him and his beneficiaries until this action of the subordinate lodge was reversed by a superior body. And it has been claimed by the plaintiff in error that as a matter of law Herron stands and has been treated as an expelled member until the action of the subordinate lodge is reversed or modified; and the records disclose no reversal or modification of the action of the subordinate lodge in expelling him therefrom. Plaintiff in error also claims that he would have no recourse to the courts until he had exhausted his remedy under the laws of the order.

We think that this is the law, and he having taken no steps to reverse or modify the order of the subordinate lodge, that neither he nor his beneficiaries can appeal to the courts until the laws or rules of the order had been exhausted.

The judgment of the superior court in special term should be reversed and judgment entered in this court that should have been rendered below.

Smith, J., concurs.

HOSEA, J., dissenting.

I am constrained to dissent from the majority opinion in this case, which assumes one side of a controversy of fact depending on contradictory testimony and determined otherwise by the jury. The record clearly shows that by the constitution and rules of the order a member does not cease to be such by nonpayment of the dues or other infraction of the rules. He can only lose his membership as the result of a trial on charges duly filed and communicated to him and an opportunity given to appear and defend; and then only by a vote of a majority of the members of the commandery. Besides this there was positive evidence showing that here was not even a *de facto* expulsion. There was affirmative evidence to show that the steps had not been taken as required by the constitution, and the question was left to the jury under the charge of the court to say whether Herron had been expelled by the commandery, and their verdict determined that he was not expelled. If, therefore, there was no expulsion, whether as a fact, or constructively by nonobservance of the rules, there was nothing to appeal from. The pretended action, if attempted, was simply void. *Foxhever v. Order of*

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Red Cross, 24 O. C. C. 56; *Dimmer v. Supreme Council C. K. of A.* 12 Circ. Dec. 413 (22 R. 366).

The cases cited also hold that proof, sufficient to show subsequent and complete abandonment of membership, may defeat recovery. But in the present case there was evidence tending to show that Herron did not acquiesce; and the answer filed below admits tender of dues by Herron through his wife (who was the beneficiary under the certificate or policy) and through brother members.

In *Langnecker v. Grand Lodge A. O. U. W.* 111 Wis. 279 [87 N. W. Rep. 293; 55 L. R. A. 185; 87 Am. St. Rep. 860], and *Guetzkow v. Insurance Co.* 105 Wis. 448 [81 N. W. Rep. 652], both these points are determined. In the former case it is said:

"Where expulsion was wrongful and void, no appeal whatever is necessary to be taken within the order. * * * Where a tender of dues has been made after a wrongful expulsion, it is unnecessary to make further tender in order to preserve the right of the beneficiary under the certificate."

Moreover, the constitution of this order provides that in case a member is in arrears for dues at the time of death it shall not defeat recovery by the beneficiary of a death certificate, but a corresponding reduction may be made in the amount paid to the widow. Still again, the record shows that the commandery owed Herron money, payment of which he never received.

So that there was evidence in the case and before the jury strongly tending to show that, legally, Herron was, at the time of his death, a member in good standing, and that his widow was entitled to her full claim. The mere fact—if it be a fact—that he became dissatisfied with the order and declared his intention to withdraw and pay no further assessments, does not deprive the beneficiary of rights under the policy. *Crockett v. Order of Red Cross*, 24 O. C. C. 421.

In view of these and various decisions in other states to the same general effect, I think the verdict was fully justified and should not be disturbed and that the judgment thereon should stand. I am the more constrained to this view by the fact that the case has already had three trials in the lower court and that a reversal at this stage results practically in a miscarriage of justice by placing the burden of further proceedings upon the widow.

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ATTACHMENT.

[Hamilton Common Pleas, January 9, 1907.]

*EUGENE LYON V. ELIZABETH PHARES.

1. SUFFICIENCY OF AFFIDAVIT IN ATTACHMENT.

Ultimate facts may be sufficient to sustain the nature of plaintiff's claim in an affidavit for attachment.

[For other cases in point, see 1 Cyc. Dig., "Affidavits," §§ 45-69; "Attachment and Garnishment," §§ 260-300.—Ed.]

2. DENIAL AFFIDAVIT OF CONCLUSIONS INSUFFICIENT.

Mere conclusions of fact in denial are insufficient to overcome probative facts establishing fraud.

3. SUFFICIENCY OF INFORMATION TO SUPPORT AFFIDAVIT.

Hearsay and belief of plaintiff construing defendant's acts insufficient to support affidavit for attachment.

[For other cases in point, see 1 Cyc. Dig., "Attachment and Garnishment," §§ 270-293.—Ed.]

4. EFFECT OF SEIZING EXEMPT PROPERTY.

Seizing exempt property on attachment does not furnish grounds for dissolving the attachment, and defendant's affidavit setting up same affects only the question of exemption.

[Syllabus approved by the court.]

W. K. Maxwell, for plaintiff.

H. L. Cooper and S. W. Bell, for defendant.

PFLEGER, J.

In an attachment appealed from a magistrate plaintiff's affidavit for attachment alleged that his claim was for "money advanced," and that the defendant was about to remove her property or a part of it out of the county to defraud her creditors, and that she was about to convert her property or part of it into money to place it beyond the reach of her

*Decision of Hamilton circuit court on error, March 7, 1907.

PER CURIAM. Lyon brought an action in attachment before a justice of the peace in Hamilton county against Phares. A motion was made before the justice to discharge the attachment, which motion the justice overruled. Thereupon the defendant took an appeal to the court of common pleas. In that court the judge gave judgment discharging the attachment. Error is prosecuted to this court to reverse the judgment of the court of common pleas.

We are of the opinion that error does not lie to this court from the judgment of the judge of the court of common pleas.

It is not the final judgment of the court of common pleas in an action pending therein. Revised Statute 6494 (Lan. 10071) permits the appeal to the court or a judge and it is intended that the question shall be decided in three days by either and when decided the decision is to be sent to the justice and by him it is to be entered as the final judgment in that matter in the justice's court and said property, money and credits are to be disposed of as directed in said judgment, i. e., by the judgment of the justice. The judgment of the justice is the only final judgment in the action and the only one to which error may be prosecuted.

This court in a former case, *Rogers v. Pruschansky*, 13-23 O. C. C. 271, has so held.

The cause shall be stricken from the docket.

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creditors. Affidavits only of the plaintiff and defendant were filed. On motion to dissolve: *Held*,

(1) While probative facts may be stated, if ultimate facts appear in an affidavit for attachment, and they are generally sufficient to apprise the defendant of the nature of plaintiff's claim, they will sustain the affidavit on that ground, in the absence of statutory requirements for greater particularity. Although it is better to allege for whose benefit the money was advanced, the attachment should not be set aside on the ultimate statement of fact that it was for money advanced.

(2) Where the basis of attachment is fraud and the affidavits of plaintiff and the defendant are filed in proof and denial thereof, the rule that the plaintiff fails because the burden is upon him, does not apply when one affidavit sets forth probative facts establishing fraud and the defendant files a general denial merely claiming that the ultimate facts are "untrue." This sort of denial will not overcome the force of an allegation that the plaintiff had disposed of her property to defraud her creditors by executing a pretended note of \$700 and a chattel mortgage, covering all her furniture and effects, and that said mortgage remained uncanceled, exhibiting a copy of such mortgage.

(3) Such evidence, however, of mortgaging chattels for a pretended debt, is insufficient to sustain either ground of the attachment that she fraudulently removed her property out of the county or converted the same into money to place it beyond the reach of creditors.

(4) Neither will any statements in the affidavits filed to support such attachment that the plaintiff is "informed and believes" defendant had consulted an auctioneer for that purpose suffice, because such belief may be unfounded; nor the allegation that she had stated to a number of persons that she intended to remove from the state and raise funds therefor, as this is merely hearsay. The affidavits of such persons as witnesses should have been produced.

(5) An allegation in the defendant's affidavit that the property attached by the constable is wearing apparel, and therefore exempt, furnishes no ground for dissolving the attachment, and affects only the question of exemption, unless this property was the only property alleged to have been fraudulently disposed of, when the right so to do becomes material.

The evidence being insufficient to sustain the grounds alleged, the motion to discharge the attachment should have been granted.

Superior Court of Cincinnati.

CONTRACTS—SALES.

[Superior Court of Cincinnati, Special Term, April 10, 1907.]

VIRGINIA CONSOLIDATED MILLING CO. v. RAILWAY SUPPLY & MFG. CO.

VALIDITY OF CONTRACT TO PURCHASE ENTIRE OUTPUT OF MANUFACTURING PLANT.

A contract which is, without qualification of any kind, an agreement on the one side to furnish and ship the entire product of a manufacturing establishment, and on the other side to take and pay for the material so furnished at the prices named, is not indefinite or uncertain with respect to the amount of material intended to be contracted for, nor is it void because unilateral and lacking in mutuality.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 43-50.—Ed.]

DEMURREE to petition.

Stephens, Lincoln & Stephens, for plaintiff.

Workum & Bowdle, for defendant.

HOSEA, J.

The petition in this case is for damages for breach of a contract as follows, to wit:

"Petersburg, Va., Oct. 3, 1904.

"The Railway Supply & Mfg. Co., Cincinnati, O.

"Gentlemen: We hereby accept the offer made by your Mr. C. A. Goodyear for our entire output of cotton waste at the following prices: f. o. b. cars Petersburg, Va.; shipments to commence May 1, 1905, and to last until May 1, 1906, including the December collection. Terms of payment S. D., B. L. attached.

"List of prices follows.

"Accepted: The Railway Supply & Mfg. Co., per C. A. Goodyear.

"Accepted: The Virginia Consolidated Milling Co., by C. A. Hartley, Treasurer."

It is alleged that on or about October 10, 1905, the defendant declined to accept further shipments under the contract, although duly offered by plaintiff, whereby the plaintiff suffered damage, etc.

The demurrer puts in issue the validity of the contract, and it is urged in the argument at bar that it is invalid, first, in that it is indefinite and uncertain in respect of the amount of waste intended to be contracted for and that this uncertainty is incapable of being made certain; and second, that it is void for want of mutuality.

It is to be noted that the contract is in terms an agreement on one side to furnish and ship the entire output of a manufacturing establishment, without qualification; and an agreement on the other side to take and pay for the material so furnished at the prices named, also without qualification. It is important to note the unqualified nature of these

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acceptances, because this fact distinguishes the case from a number of reported cases where contracts of this general nature are held to be optional on one side or the other and therefore unilateral and void.

In *Loudenback Fertilizer Co. v. Phosphate Co.* 121 Fed. Rep. 298, 300 [58 C. C. A. 220], Judge Lurton, rendering the opinion of the U. S. circuit court of appeals for the sixth circuit, tersely states the distinction. He says:

"A contract to buy all that one shall require for one's use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. * * * It is this obligation to take the entire supply of an established business which saves the mutual character. * * * Such a contract would not be unilateral. * * * The amount which is to be bought is made as definite as possible under the circumstances. The quantity is to be measured by the requirements of the factory in a business which necessarily requires * * * a very large amount if * * * operated in the future as in the past. Though the quantity to be bought and sold was indefinite, it is ascertainable by the terms of the agreement, and therefore certain. '*Certum est quod certum reddi potest.*'"

These principles have long been recognized and applied in both state and federal courts in this class of cases. Thus in a case before the Supreme Court of the United States Justice Bradley thus states the rule:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as * * * all that may be manufactured by the vendor in a certain establishment * * * and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot, and the naming of quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is analogous to that which is applied in the description of lands, where national boundaries and monuments control courses and distances and estimates of quantity." *Brawley v. United States*, 96 U. S. 168 [24 L. Ed. 622].

The following instances in which specified contracts have been upheld fully support this distinction:

1. Contract to accept all the naptha that a manufacturer may make in two years. Lord Abinger held it valid as applying to the works then in operation, and to its normal capacity. *Guillim v. Daniel*, 2 Crompt. M. & R. 61.

2. Contract to sell "all the rye straw defendant (a farmer) had to spare." The quantity, said the court, could be ascertained by ex-

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trinsic evidence, and applied the maxim: "*Id certum est quod certum reddi potest.*" *Parker v. Pettit*, 43 N. J. Law 512.

3. Contract by a lumber company for its "requirements" of coal for an entire season, construed to mean the amount of coal that it should need in its business for such season and not merely what it might choose to require of the other party—and upheld against a claim of uncertainty and want of mutuality. *Minnesota Lumber Co. v. Coal Co.* 160 Ill. 85 [43 N. E. Rep. 774; 31 L. R. A. 529], reversing *Minnesota Lumber Co. v. Coal Co.* 56 Ill. App. 248.

4. Contract to furnish all the ice M might require for the use of his hotel for five years. Held valid and mutually binding. *Smith v. Morse*, 20 La. Ann. 220.

5. Contract to furnish ice (similar to above). Held not void for want of mutuality, as the quantity to be taken is measured by the necessities of the business, which is presumed to continue for the time agreed. *Hickey v. O'Brien*, 123 Mich. 611 [82 N. W. Rep. 241; 49 L. R. A. 594; 81 Am. St. Rep. 227].

6. Contract to furnish all the tin cans that plaintiff might use in a canning factory for a stated period. Held not a mere option or unilateral contract revocable by defendant, but a valid, mutual contract, binding both parties. *Dailey Co. v. Canning Co.* 128 Mich. 591 [87 N. W. Rep. 761].

7. Contract to furnish coal for steamers making trips between ports for one year. Held to be a contract for delivery of all the coal required for the operation of the steamers, and not for successive deliveries upon notice or order; and sale of the steamers did not relieve defendants of the obligation. *Wells v. Alexandre*, 130 N. Y. 642 [29 N. E. Rep. 142; 15 L. R. A. 218].

8. Contract to take for two years, monthly as produced and placed on market by publisher, one of each size of certain fashion patterns. Held not void for uncertainty. *McCall Co. v. Icks*, 107 Wis. 232 [83 N. W. Rep. 300].

9. Offer to purchase the product of a certain mine for a fixed period at stipulated prices per ton, accepted by the mining company. Held to be a contract to purchase the entire output of ore mined and marketable. "True," says the court, "there was no agreement to furnish any ore, but the business of appellant was mining and producing ore, and it was to be presumed that it would mine and furnish it if in the mine and accessible." Held to be not void for want of mutuality or want of consideration. *Lee Silver Mining Co. v. Railway*, 16 Colo. 118, 130 [26 Pac. Rep. 326].

10. Contract between a manufacturer of pig iron and another engaged in a business using it, to supply all that the purchaser should "need, use or consume" in his business during a specified time. Held

Milling Co. v. Supply & Mfg. Co.

not lacking in mutuality. *National Furnace Co. v. Manufacturing Co.* 110 Ill. 427. To the same effect, see *Manhattan Oil Co. v. Lubricating Co.* 113 Fed. Rep. 923 [51 C. C. A. 553]; *Staver v. Steel Co.* 104 Fed. Rep. 200 [43 C. C. A. 471]; *Lanford v. Wooden-Ware Co.* 127 Mich. 614 [86 N. W. Rep. 1033]; *Crane v. Crane*, 105 Fed. Rep. 869 [45 C. C. A. 869]; *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283 [62 N. E. Rep. 367]; *Müller v. Kendig*, 55 Iowa 174 [17 N. W. Rep. 500].

In the light of this general consensus of opinion emanating from courts of highest authority we need not stumble over the incautious use of language by the judge delivering the opinion of our Supreme Court in *Herrick v. Wardwell*, 58 Ohio St. 294 [50 N. E. Rep. 903]. The contract there was to sell and ship all the milk produced by Nichols, amounting to twenty gallons or more per day; and while the language of the opinion is in parts obscure, the ultimate holding is in accord with the views hereinbefore detailed, which clearly show that there was no weakness in the contract and no optional feature. What the court means undoubtedly was that there was on the face of the contract itself uncertainty in the exact amount to be produced by Nichols; but if, as is to be inferred, Nichols had an established dairy business, the capacity of that business as theretofore and then existing to produce milk was the feature by which the amount was rendered reasonably certain, and to this he was absolutely bound without any option. The dictum on this point would apply to a contract to deliver on optional orders, but such was not the contract before the court. It would seem, however, that the claim made in the case was only for milk actually delivered; so that the question at issue in the case at bar was not before that court.

It seems to me clear upon the overwhelming weight of authority that the demurrer in the present case is not well taken and should be overruled, and it is so ordered.

Demurrer overruled with leave to answer in five days.

Superior Court of Cincinnati.

CHARGE TO JURY—NEGLIGENCE—STREET RAILWAYS.

[Superior Court of Cincinnati, General Term, 1907.]

Ferris, Hoffheimer and Swing, JJ.

(Judge Swing of the Hamilton common pleas, sitting in place of Judge Hosea.)

HENRY H. WIGGERS v. CINCINNATI TRAC. CO.

1. INSTRUCTION ON DOCTRINE OF LAST CLEAR CHANCE.

In an action against a street railway for damages from alleged negligence in running a street car into plaintiff's automobile, an instruction charging that if the motorman, in the exercise of ordinary care, could have discovered plaintiff's automobile approaching at the crossing in time to enable him to check the speed and stop the car, the street railway company is liable, even though the plaintiff was negligent in allowing any part of his automobile to come upon the car track, was properly refused.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 398-410; 7 Cyc. Dig., "Street Railroads," §§ 534-548.—Ed.]

2. INSTRUCTIONS SHOULD NOT ASSUME DISPUTED FACTS.

An instruction is faulty that assumes a state of facts which are in dispute and is properly refused.

[For other cases in point, see 2 Cyc. Dig., "Charge to Jury," §§ 300-351.—Ed.]

ERROR to special term.

Guido Gores and C. M. Cist, for plaintiff in error.

Kinkead, Rogers & Ellis, for defendant in error.

HOFFHEIMER, J.

This was an action to recover damages because of the alleged negligence of defendant in running into plaintiff's automobile. The verdict was for the traction company and in due course judgment was rendered thereon. Plaintiff in error seeks a reversal of said judgment upon several grounds:

First. It is claimed that the court erred in refusing to give the following special charge:

"If you find that by the exercise of ordinary care the street car motorman could, by looking ahead on Auburn avenue, have discovered plaintiff's automobile approaching the street car track at the crossing before him in time to enable the motorman to check his speed and stop his car and thus avoid striking plaintiff's automobile and injuring it, then I charge you that you must return a verdict in favor of the plaintiff, even if you find also that plaintiff was negligent in allowing any part of his automobile to come onto the street car track."

This is an incorrect statement of law and was also an effort to inject into the case the last-chance doctrine when it was neither warranted by the evidence nor the pleadings. The court was, therefore, justified in rejecting it. *Drown v. Traction Co.* 76 Ohio St. 000.

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Second. It is also urged that the court erred in refusing to give the following special charge:

"If you find that plaintiff found himself in a position of emergency and unexpected danger when the street car approached without any signal of warning and uncontrolled by the motorman, then I charge you that you must consider plaintiff's acts in the light of the impending peril and the shortness of time in which to act, and I furthermore charge you that if you find that plaintiff exercised ordinary care under all the circumstances, he is not guilty of contributory negligence, even if he did not do the very best thing possible at the time of the emergency."

This charge is open to several objections, but the principal fault lies in the fact that it assumes a state of facts which were in dispute, as the record shows. Attention is directed to the language, "when the street car approached without any signal of warning and uncontrolled by the motorman." We think the court was justified in rejecting this charge.

It is also claimed that the court erred in its general charge, but upon reading the charge we think that, taken as a whole, the court stated the law applicable to the facts. We find no error prejudicial to the plaintiff in error, and believing that substantial justice has been done we affirm the judgment below.

Ferris and Swing, JJ., concur.

Hamilton Common Pleas.

ASSESSMENTS—MUNICIPAL CORPORATIONS.

[Hamilton Common Pleas, February 13, 1906.]

CINCINNATI (CITY) v. JACOB S. BURNET ET AL.

EFFECT OF APPROPRIATION OF PROPERTY, ON OWNER'S LIABILITY FOR ASSESSMENTS.

Owners of private property appropriated by a municipal corporation for park purposes are not liable for street assessments under the ten-year payment plan, and not yet due.

SPIEGEL, J.

The only question in this case is, whether lot owners, where property has been appropriated by the city of Cincinnati for park purposes, are liable for street assessments not yet due and payable under the ten years' payment plan, adopted by said lot owners. The decision of the Supreme Court in *Wakley v. Whiteman*, 61 Ohio St. 587 [56 N. E. Rep. 461], is not applicable, because while determining that installments not due and payable within the year next after the last day of September remain a lien upon the real estate in the hands of a purchaser, this decision is limited to judicial sales, or sales by administrators, executors, guardians or trustees, and I cannot, therefore, extend it to cases of eminent domain. Furthermore the court of common pleas (Judge Pfleger deciding) in cause No. 119685, Cincinnati v. Kirker, an analogous case, has determined that the property owners must pay these deferred amounts. I follow the rule laid down by Pollock, C. B., in *Leech v. Railway*, 29 L. J. M. C. 150:

"The rule is this: That wherever there is a decision of a court of concurrent jurisdiction, the other courts will adopt that as the basis of their decision, provided it can be appealed from. If it cannot be appealed from, then they will exercise their own judgment."

Judgment for plaintiff.

Caldwell v. Hill.

CORPORATIONS.

[Superior Court of Cincinnati, October, 1904.]

FRANK S. CALDWELL v. HILL & GRIFFITHS Co.**RIGHT OF STOCKHOLDER TO EXAMINE BOOKS OF THE COMPANY.**

A stockholder of a corporation has the right, by virtue of Rev. Stat. 3254 (Lan. 5195), to examine all the books and entries therein of the corporation, and the motive for making such an examination is immaterial and cannot curtail the right to make such examination.

[For other cases in point, see 3 Cyc. Dig., "Corporations," §§ 821-840.—Ed.]

J. C. Healy and Malcolm McAvoy, for plaintiff.

H. P. Goebel, for defendants.

HOFFHEIMER, J.

Plaintiff asks that defendant be enjoined from refusing to allow him to inspect its books and records. The evidence shows plaintiff is a stockholder in defendant company and that he demanded an inspection under Rev. Stat. 3254 (Lan. 5195). Said section is as follows:

"And the books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder."

Whilst the agents of plaintiff were permitted to make a general examination, it cannot be denied that some entries in certain books were concealed and that therefore plaintiff's agents could not see all the entries in said books. Indeed counsel for defendant practically admits that these entries were purposely withheld, and in open court states that defendants further intend to withhold said entries from plaintiff. It is claimed by defendant that plaintiff desires the information he seeks for the benefit of a rival and competing company. This is immaterial. The Supreme Court in *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189 [56 N. E. Rep. 1033; 48 L. R. A. 732; 78 Am. St. Rep. 707], has laid down the rule, that a stockholder has the right to examine all the books of defendant company at any reasonable time, and this right cannot be curtailed no matter what the motive of the examination may be, and further, as a necessary incident to such right, is the right to take copies.

The motion will be granted and an injunction allowed as prayed for.

Hamilton Common Pleas.

CONSTITUTIONAL LAW—COURTS—SUNDAY LAWS.

[Hamilton Common Pleas, October, 1904.]

GEORGE SPAETH V. STATE OF OHIO.**1. CONSTITUTIONALITY OF ACT REQUIRING BARBER SHOPS TO CLOSE ON SUNDAY.**

Laning Rev. Stat. 10753 (B. 7033-1), providing for the closing of barber shops on Sunday, is constitutional as it is within the legislative power to protect employes' right to one day's rest.

2. PRESUMPTION AS TO VALIDITY OF LEGISLATIVE ACTS.

When the constitutionality of an act is doubtful the lower courts will uphold it, leaving the Supreme Court to hold it invalid.

[For other cases in point, see 7 Cyc. Dig., "Statutes," §§ 200-210.—Ed.]

Miller Outcalt, for plaintiff in error.

Bates & Meyer, for defendant in error.

SWING, J.

Held, that Lan. Rev. Stat. 10753 (B. 7033-1), known as the barbers' Sunday closing law, is constitutional, on the ground that it is within the power of the legislature to pass such act to protect employes in the right to the enjoyment of one day's rest in seven. The Supreme Court of the United States, in *Petit v. Minnesota*, 177 U. S. 164 [20 Sup. Ct. Rep. 666; 44 L. Ed. 716], and courts of last resort in most of the states have so held.

If the question could be said to be doubtful, the rule is, that the act should be upheld—a rule, I think, particularly applicable to the decision of a lower court in such case as this. If the act is to be held invalid it should be by the court of last resort, whose decision would be of effect in the entire state. Otherwise the act might be held invalid in one jurisdiction and valid in another.

Hall v. Railway.

EVIDENCE—PLEADING—WITNESSES.

[Superior Court of Cincinnati, March 8, 1905.]

VERONIKA HALL, ADMX. v. PENNSYLVANIA RY.

1. PLEADING EVIDENTIAL FACTS UNNECESSARY.

In an action based on alleged negligence in the operation of a train, it is not necessary to plead facts relating to efforts to check the speed of the train. If the petition is indefinite and vague the defendant's remedy is by motion to make more definite and certain, and not by demurrer. Post
[For other cases in point, see 6 Cyc. Dig., "Pleading," §§ 250-253.—Ed.]

2. WEIGHT OF INFERENTIAL EVIDENCE.

Inferential facts deducible from those established or asserted, are to be considered together with the physical facts established by direct testimony.

[For other cases in point, see 4 Cyc. Dig., "Evidence," §§ 3689-3699.—Ed.]

3. INTERPRETATION OF WORDS IN CHARGE TO JURY.

Use of the word "trainmen" in a charge to the jury is not reversible error as being confusing, where the reasonable interpretation does not confine its meaning to the enginemen as distinct from the brakemen and conductor, as in this case.

[For other cases in point, see 2 Cyc. Dig., "Charge to Jury," §§ 201-281.—Ed.]

4. IMPEACHING ONE'S OWN WITNESS.

A party calling a witness presents him as a truthful person and worthy of belief, and if dissatisfied with his testimony cannot be permitted to impeach his testimony by showing that given on a former trial.

[For other cases in point, see 7 Cyc. Dig., "Witnesses," §§ 447-449.—Ed.]

MOTION for new trial.

F. L. Hoffman, for plaintiff.

Maxwell & Ramsey, for defendant.

HOSEA, J.

1. The claim of defendant that the charge of the court relating to efforts to check the speed of the train was erroneous because this was not pleaded as an element of negligence, is met by the rule that excludes merely evidential facts. The charge is negligence in the operation of the train, producing the injury complained of; and it is not necessary in such a case to plead all the facts contributing thereto and tending to establish the negligence of such act. "To plead specially all the facts and circumstances from which negligence would be inferred would be to plead evidence instead of facts." *Davis v. Guarineri*, 45 Ohio St. 470 [15 N. E. Rep. 350; 4 Am. St. Rep. 548]; *Meek v. Railway*, 38 Ohio St. 632.

Defendant had a right, if he deemed the pleaded allegations vague or indefinite, to move to make them definite and certain. Failing to do so, it is too late to complain after going to trial on the issues as pre-

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sented. *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326 [64 N. E. Rep. 130].

2. As to absence of proof to support the charge involved in the foregoing, it may be said that the proof in a case is not confined to the allegations of witnesses. There are physical facts established directly by statement, and inferential facts deducible from those established or asserted, which are quite as important and which in this case bore directly on the matters embodied in the charge.

3. As to the word "trainmen," in the charge, without specifying the engineer and fireman exclusively, I am not aware that this is reversible error unless used in circumstances where it might mislead a jury to the prejudice of a defendant. *New York, C. & St. L. Ry. v. Kistler*, *supra*, refers to it in passing, but in the same case a brakeman is included by the court itself as one upon whom the duty is cast.

In the present case it was not misleading as it manifestly related only to those on the engine.

4. In the matter of refusing to permit counsel for defendant to impeach his own witness, the rule is an elementary one, that this cannot be done. It is true that in a proper case where counsel is taken by surprise, question may be allowed, referring to former statements for the purpose of refreshing his memory, etc., as in *Hurley v. State*. 46 Ohio St. 320 [21 N. E. Rep. 645; 4 L. R. A. 161]; but such was not his present case. Counsel here insisted upon his right to show former testimony of the witness under oath for the purpose of impeaching him.

Where a witness is put upon the stand, the party who does so, and who expects to benefit by his testimony, presents him as a truthful person and worthy of belief. It would be most extraordinary, if, being dissatisfied with the testimony, he could be permitted then to show that the witness is unworthy of belief, and thus avoid the effect of the testimony he himself has introduced. The rule on this point is too well settled to admit of discussion.

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Where a county treasurer accepts personal check in payment of taxes and indorses the same in blank to a bank, and is given a certificate of deposit, he cannot, upon the insolvency of the bank, follow the check or the money of the trust fund. *Towson v. Cole*. 282

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One who places his signature in blank upon a promissory note before delivery is an indorser; and, if not within the exceptions of Rev. Stat. 3175f (Lan. 5012), cannot be charged for the non-payment of the note unless presentment for payment has been made to the maker, at maturity. *Dollar Sav. Bank Co. v. Pottery Co.* 539

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Building an apartment house is a violation of a restriction which requires the grantee to use the lot "for residence purposes only." *Ib.*

Where there are restrictions in a deed conveying a fee, forbidding the erection of a building except a certain kind, grantor may sue for violation of covenant although the lot is a subdivision, no plan as to cost and kind of houses, and although there are no restrictions on other lot owners, and even though grantor owned no other lot in subdivision. *Ib.*

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To exclude persons from serving on a jury solely on account of their race or color is to deny the equal protection of the laws contrary to the fourteenth amendment of the constitution of the United States. *Ib.*

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Laning Rev. Stat. 7586 (B. 4427-4) distinguishes between two classes who may become liable thereunder; hence in an indictment charging any person in the first of said classes with a violation of said Valentine antitrust act, knowledge need not be averred or proven, but knowledge must be averred and proven in an indictment against any member of the second class. State v. Delivery Co. 515

No overt act need be charged in the indictment against the persons, firms, partnerships, corporations or associations mentioned in Sec. 1 of the Valen-

tine act. The mere membership in the illegal combination or trust is sufficient to constitute an offense under said act and in such case the venue of the indictment is the county where such members of said combination reside or exist, without reference to where the trust itself as an entity exists or does business. Ib.

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The power of a board of public service to make contracts involving more than \$500 without the action of the council has reference to original contracts only. *Ib.*

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Notice by registered letter to a mortgagee by the husband of the mortgagor who had joined in conveying part of the mortgaged premises to their child, that such conveyance had been made and the mortgaged property not so conveyed must first be exhausted to satisfy the mortgage, is sufficient. *Henry v. Henry.* 313

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Where a word which has two significations is used in a statute, it should ordinarily receive that meaning which is generally given to it. State v. Bovee. 663

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The route of one street railway company may, with the agreement with another company, be extended by ordinance of the city council over all or a part of the existing routes of such other company. *Ib.*

The council may terminate all or part of a grant previous to its expiration, and renew the franchise to such part, terminated for any period not in excess of the limitations fixed by statute, providing that the company is not released from any of its obligations under the old franchise. *Ib.*

The remedy of an abutting owner who is injured by the double tracking of a street railway is private and the city solicitor cannot anticipate such injury with a remedy by injunction brought under Rev. Stat. 1777 (Lan. 3280). *Ib.*

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In an indictment under Lan. Rev. Stat. 5538, 5539 (B. 3443-3, 3443-4), making it an offense for failure to provide a heating device for motorman, which charges that it was the duty of the accused to carry out the provisions of said sections, it is not necessary to aver how or by whose authority said duty was impaired. *Ib.*

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as a decision as to the validity of the
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